



**Kenya Airports Authority v Chief Land Registrar & 3 others (Environment & Land
Petition E005 of 2020) [2024] KEELC 575 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 575 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E005 OF 2020

OA ANGOTE, J

FEBRUARY 8, 2024

**IN THE MATTER OF ARTICLES 23, 40, 61, 62 AND
67 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 3, 4 AND 13
OF THE KENYA AIRPORTS AUTHORITY ACT**

AND

IN THE MATTER OF SECTION 80 OF THE LAND REGISTRATION ACT

BETWEEN

KENYA AIRPORTS AUTHORITY PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JULIANA WANJIRU KARIUKI 4TH RESPONDENT

JUDGMENT

1. Before the Court for determination is the Petitioner’s Petition dated 10th August 2020 and brought under Sections 13(1), (2), (3) and (7) of the *Environment and Land Court Act* and Rules 3, 4(1), 8 and 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Petitioner is seeking for the following orders:

- a. A declaration that land set aside for public use is not available for alienation and/or allotment to private entities.



- b. A declaration that Land Reference Number 9042/940 measuring approximately 0.1902 hectares situated in Embakasi Area, Nairobi (hereinafter the suit property) is public land and not available for alienation and/or allotment to the 4th Respondent or any other party.
 - c. A declaration that the 1st Respondent's issuance of a title document to the 4th Respondent over the suit property was null and void ab initio and ineffectual to confer any right, interest or title upon the 4th Respondent.
 - d. An order do issue directed at the 4th Respondent to forthwith deliver the grant in respect to the suit property to the 1st Respondent for cancellation.
 - e. A permanent injunction do issue against the 4th Respondent, her agents, servants, employees, invitees and/or otherwise whomsoever from further trespassing, constructing or continuing with the construction of any structures or buildings, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using or intermeddling in any way whatsoever with the public land vested in the Petitioner that is the suit property.
 - f. An order do issue to the land registrar for cancellation of the allocation of the suit property in favour of the 4th Respondent and title documents issued to the 4th Respondent so as to restore the suit property to the Petitioner.
 - g. The structures constructed on the suit property by the 4th Respondent be removed within 90 days of the judgement of the Court.
 - h. All costs incidental to above be borne by the Respondents.
 - i. General damages for trespass to land and fraud.
 - j. Costs of the petition.
 - k. Interests on (j) above at court rates.
 - l. Any other reliefs that the Court deems fit to grant.
2. The Petitioner anchored its case on various constitutional and statutory provisions including: Articles 22(1), 23(1), 40, 62 and 67 of *the Constitution*, Sections 3 and 4 of the *Kenya Airports Authority Act* and Section 80(1) of the *Land Registration Act*.
 3. It was averred by the Petitioner that the suit property was set aside for public use and was administered by the State Department of Aerodromes, Office of the President and that sometimes in 1994, all property that vested in the State Department of Aerodromes was transferred to the Petitioner vide Legal Notice No. 201 of 7th June 1994.
 4. It is the Petitioner's case that on 15th August 2002, the Physical Planning Department of the Ministry of Lands and Settlement approved the development plan for the suit property for use by the Petitioner for staff housing and that the members of the public were notified of the same vide Gazette Notice Number 4326 of 16th March 2009.
 5. According to the Petitioner, it later learnt that the suit property which had been set aside for public use had been illegally alienated to the 4th Respondent and a title issued in her favour and that it took up the matter with the Director of County Land Survey, Nairobi County and the 2nd Respondent but never received response from either party.



6. The Petitioner further averred that the National Assembly Committee on Public Investment in its 19th and 23rd reports observed that the suit property was illegally excised from the existing land without due regard to the approved development plan.
7. In view of the foregoing, the Petitioner averred that its rights have been violated as firstly, the 1st Respondent issued a title to the 4th Respondent for land that was meant for public use; secondly, the said issuance threatens the Petitioner's fundamental rights as guaranteed under Article 40 of *the Constitution*; and thirdly, that the 2nd Respondent has failed to investigate and take necessary action in the matter surrounding the issuance of the title of the suit property.
8. The 4th Respondent filed a Replying Affidavit sworn on 18th September 2020. She deponed that she moved to the suit property in 1980 with her late husband and started a retail kiosk; that at the time, the property owned by the Petitioner's predecessor was secured by a perimeter fence neighbouring the suit property which she found out was owned by the Nairobi City Council and that she made an application for allocation of the land and after following the necessary processes was issued with an allotment letter for what was referred to as Plot 566 A Embakasi.
9. The 4th Respondent stated that she paid the required premium and rent and continued being in possession of the suit property without interruption from the Petitioner; that she has been following up the title documents but has only so far been issued with a Deed Plan for the suit property; that the allocation of the land to her was legal and that the suit property is not part of the Petitioner's property.
10. The 4th Respondent called into question the Petitioner's claim of ownership stating that the Petitioner had not attached any documents supporting such claim. Additionally, the 4th Respondent stated that the vesting order and the gazette notices relied on by the Petitioner do not make a specific reference to the suit property.
11. The 4th Respondent deponed that the Petitioner owns L.R No. 9042/2 which is next to the suit property but is distinct from the suit property and that the development plan and gazette notice relied on by the Petitioner are from the year 2009, by which time she already had her allotment letter and even replaced the semi-permanent structure on the suit property with permanent ones in 2012 with the full knowledge of the Petitioner.
12. It was the 4th Respondent's deposition that the suit should be dismissed because the Petitioner had not enjoined the County Government of Nairobi as a lessor; that the Petitioner ought to have filed the suit by way of a Complaint instead of a Petition and that the Petition does not meet the standards set in *Anarita Karimi Njeru vs Republic* [1979] eKLR.
13. The 4th Respondent deponed that the Petitioner is not an individual that enjoys fundamental rights and freedoms and is therefore incapable of instituting a constitutional Petition.
14. The 1st, 2nd and 3rd Respondents did not file responses to the Petition.
15. During the hearing, the Petitioner's Planning and Research Manager testified as PW1. He adopted his affidavit as part of his evidence-in-chief and produced the attached documents as exhibits.
16. PW1 stated that the current dispute relates to land within the Petitioner's housing scheme known as Embakasi Village. While referring to the Vesting Order and the plan, PW1 stated that the exhibits detailed the land that belonged to the Petitioner, including the land labelled 'N' of which the suit property is part of.



17. PW1 stated that the parcel of land labelled 'N' belongs to the Petitioner and comprises the suit property and L.R No. 9042/12; that a surveyor excised a portion of the land belonging to the Petitioner and that the said survey followed the PDP and can only be cancelled by the Director of surveys.
18. In conclusion PW1 testified that the Petitioner appeared before the National Assembly Public Investment Committee in response to an audit query and that the Petitioner has however not addressed the issues raised during the audit.
19. In cross-examination by the 4th Respondent's advocate, the witness started by stating that there was sufficient evidence to show that the Petitioner owns the land and that the Petitioner has buildings on the said land but acknowledged that the Petitioner has no title or letters of allotment to the land it claims.
20. PW1 stated that there was an advisory plan that was signed by the Commissioner of Lands and Director of Surveys and that the said plan shows that the parcel labelled 'N' belonged to the Petitioner and it also shows a part of the parcel labelled 'N' had been excised.
21. PW1 stated that the Petitioner has been administering the land on behalf of the public; that the anomaly relating to the suit property was discovered in 2018 and that the PDP was sufficient to prove the Petitioner's ownership and was even more important than a title.
22. The 4th Respondent testified as DW1. DW1 adopted her affidavit as her evidence-in-chief and produced the attached documents as exhibits. She further stated that she has lived on the suit property since 1982 and operated a shop and built a house thereon with no interference from the Petitioner.
23. In cross-examination by the Petitioner's advocate, DW1 stated that she stopped building on the suit property around 2019/2020 when she received a letter from the Petitioner; that she has been on the suit property since 1981; that initially, she had a licence that lasted for 17 years and that she has a deed plan for the land.
24. It was the evidence of DW1 that she applied for a title from the Nairobi City Council but is yet to receive it. In conclusion, she stated that when she made the application to be allocated the land, Nairobi City Council informed her that the suit property did not belong to the Petitioner.

Submissions

25. The Petitioner filed its submissions on 8th February 2023. Relying on the cases of Anarita Karimi Njeru (Supra), Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR, the Petitioner submitted that it had met the requirements for filing a constitutional Petition.
26. The Petitioner's counsel relied on the cases of Dina Management Limited v County Government of Mombasa & 5 Others [2021] eKLR, Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 Others [2021] eKLR and Rukaya Ali Mohamed vs David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004, and submitted that Courts have been bold in reversing the allocation of unsurveyed land to public entities.



27. It was submitted that the 4th Respondent did not follow the correct procedure because the suit property is public land, and belongs to the Petitioner and not Nairobi City Council and that there was no recommendation that the suit property was available for allocation.
28. It was submitted by the Petitioner’s counsel that the 4th Respondent acquired her allotment letter illegally and has consequently not been able to get a title even after applying for one in 1997.
29. The 4th Respondent filed her submissions on 18th July 2023. She submitted that fundamental rights and freedoms are guaranteed to a people against violation by the government not the other way round. Additionally, the 4th Respondent stated that Article 40(3) of *the Constitution* of Kenya which the Petitioner is relying upon clearly provides: ‘The State shall not deprive a person of property...’ In view of the foregoing, the 4th Respondent submitted that the Petitioner has no locus to bring the current Petition.
30. It was submitted that for one to prove ownership of land, one must avail a contract, allotment or certificate of title and that the Petitioner did not avail such documents in support of its ownership claim, but only relied on a map with a plot marked ‘N’ which is a general development plan for Embakasi Village and cannot be used as a substitute for ownership documents.
31. The 4th Respondent deponed that the Petitioner did not produce a schedule of the properties it owns; that she has sufficiently demonstrated how she came to own the suit property; that she fulfilled the conditions set out in the allotment and that her PDP was approved and a survey plan was prepared.
32. It was submitted that the Petitioner was trying to shift the burden of proof to her by stating that she should have enjoined the Nairobi City Council as a party to the Petition and that it is the Petitioner that should have enjoined the Nairobi City Council and the Petitioner’s failure to do so makes the Petition fatally defective.

Analysis and Determination

33. At the heart of this dispute is the ownership of the suit property. The Petitioner has averred that the suit property forms part of its land, and is therefore classified as public land. Consequently, at all material times, the suit property was not available for allocation.
34. On the other hand, the 4th Respondent’s case is that she owns the suit land which was rightfully allotted to her by the previous owner, Nairobi City Council.
35. Article 62 (1) (b) defines public land to include:

“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.”
36. The Petitioner has stated that it lawfully holds the suit property. It is the Petitioner’s case that the land was initially administered by the Department of Aerodromes, Office of the President. According to the Petitioner, in 1994, the land was transferred to the Petitioner vide a Vesting Order made on 7th June 1994.
37. The Petitioner averred that it continued administering the land and was issued with a Part Development Plan for development of its staff houses known as Embakasi Village on 16th March 2009 and that it later on noticed that the suit property had been excised from the land.



38. The 4th Respondent sought to rebut the Petitioner's claim of ownership by stating that she had been in occupation of the suit property since the 1980s. She stated that she has been in occupation of the land and her occupation had been legitimized by a licence, a letter of allotment and a deed plan.
39. The licence on record issued to the 4th Respondent is for the year 1989 and shows that the 4th Respondent was licensed by the Nairobi City Council to operate a grocery kiosk. It does not confer any ownership rights of the suit property on the 4th Respondent nor does it make any direct reference to the suit property.
40. As for the letter of allotment and the deed plan, the 4th Respondent asserts that the same prove that her ownership of the suit property is bona fide and legal. She stated that the suit property was next to the land that belongs to the Petitioner but does not belong to the Petitioner.
41. According to the 4th Respondent, she was allocated the suit property by the then Nairobi City Council. However, she did not produce any evidence to show that the Nairobi City Council indeed owned the suit property or that the suit property was not part of the Petitioner's land.
42. In view of the foregoing I find that the suit property formed part of the Petitioner's land at the time the 4th Respondent applied to be allocated the same.
43. The allotment letter issued to the 4th Respondent was issued by the Town Clerk's Department at the Nairobi City Council. The 4th Respondent has however not demonstrated how the Nairobi City Council had authority to allot her land that has been proven belonged to the Petitioner.
44. There is no evidence on record to show that the Petitioner handed over the ownership of the suit property to Nairobi City Council. In any event, the 4th Respondent did not call a witness from the Nairobi City County Government to testify on the authenticity of the letter of allotment, or the fact that the land initially belonged to the County Government of Nairobi.
45. In the case of Nelson Kazungu Chai & 9 Others vs Pwani University [2014] eKLR, this court clarified that land reserved for public purposes cannot be allocated to individuals.

“The above two sections clearly shows that land reserved for public purpose cannot be allocated to individuals. This position has been reinstated at Article 62 (1) (b) of *the Constitution*. The Article has defined “public land” to include land lawfully held, used or occupied by any State organ. Such land cannot be disposed of or otherwise used except in terms of an Act of Parliament.

152. The issue of land which has been set aside for public purpose not been available for allocation by the President or the Commissioner of Lands has been up held in numerous decisions.

153. In the case of Lalitchandra Dugarshankar Padya & Another Vs Saled Awale & Another, Mombasa HCCC No. 87 of 2001, Justice Maraga , as he was then held as follows:

“ I am also satisfied and I find that at all material times the suit piece of land was to the knowledge of the Plaintiffs as it is clear from the letters EX 25 and 26, public land vested in the second Defendant (Kenya Railways) for its use as a marshaling yard. At no time did the second defendant surrender it to the Government. It was therefore by virtue of section 9 of the Government *Land Act*, not available



for allocation by the Commissioner of Lands. Its allocation to the people who later transferred it to the Plaintiffs was therefore null and void.”

154. In African line transport Co. Ltd Vs the AG, Mombasa HCCC No. 276 of 2003, Njagi J. held as follows:

“Finally, there is nothing on record to suggest that the site was ever surrendered back to the Government. Having been allotted to the NYS as a public utility, there was nothing left to be re-allocated to Mr. Omari and the subsequent grant to him was therefore irregular.”

155. In the case of H.H. DR. Syedna Mohammed Burhennuddin Saheb & Others Vs Benja Properties Ltd, Nairobi HCCC NO. 73 of 2000, Visram J, as he was then, held as follows;

“In any event the letter of allotment purchased by the Defendant had expired, and was subject to a disclaimer. In any event, that letter was worthless because it purported to allot land under the Government *Land Act* that was not available for allotment.”

156. In James Joram Nyaga & another Vs The AG and Others, Nyamu J, as he was then, and Wendo J held as follow:

“We therefore hold that the suit land having been acquired for public purpose, that is construction of road, is held in trust of the public and could not have been allocated to the Applicants who are private individuals for their private use.”

157. While discussing the concept of public trust and public interest, Nyamu J, as he was then, in the case of Kenya Guards Allied Workers Union Vs Security Guards Services & 38 Others Nairobi HC Misc 1159 of 2003, stated as follows;

“How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title. Are the courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public plot such as a hospital by an individual violates the public or national interest and therefore a violation of *the constitution*. I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbins”.

158. I am in agreement with the sentiments of the Judges in the above cases.”

46. Having established that the suit property is public land belonging to the Petitioner and having established that public land reserved for public purpose cannot be allotted to an individual, like in this case, I find that the suit property could not have been allotted to the 4th Respondent.

47. In the circumstances, it is the finding of the court that the allotment letter dated 15th June 2007 and the subsequent deed plan that the 4th Respondent has relied are void ab initio.



48. In view of the foregoing, I allow the Petitioner's claim as follows:

- a. A declaration be and is hereby issued that Land Reference Number 9042/940 measuring approximately 0.1902 hectares situated in Embakasi Area, Nairobi (hereinafter the suit property) is public land and not available for alienation and/or allotment to the 4th Respondent or any other party.
- b. A declaration be and is hereby issued that the 1st Respondent's issuance of a title document to the 4th Respondent over the suit property was null and void ab initio and ineffectual to confer any right, interest or title upon the 4th Respondent.
- c. An order do issue directed at the 4th Respondent to forthwith deliver the grant in respect to the suit property to the 1st Respondent for cancellation.
- d. A permanent injunction is hereby issued against the 4th Respondent, her agents, servants, employees, invitees and/or otherwise whomsoever from further trespassing, constructing or continuing with the construction of any structures or buildings, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using or intermeddling in any way whatsoever with the public land vested in the Petitioner, that is the suit property.
- e. An order is hereby issued to the Land Registrar for cancellation of the allocation of the suit property in favour of the 4th Respondent and title documents issued to the 4th Respondent so as to restore the suit property to the Petitioner.
- f. The structures constructed on the suit property by the 4th Respondent be removed within 90 days of the judgement of the Court.
- g. All costs incidental to the above be borne by the 4th Respondent.
- h. The 4th Respondent to pay the costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Pamba for Petitioner

Mr. Gikonyo for Thuita for 4th Respondent

Mr. Mange for 1st and 3rd Respondent

Court Assistant - Tracy

