



Oloo v Speaker County Government of Migori & another (Environment and Land Constitutional Petition 1 of 2023) [2024] KEELC 1226 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2023
MN KULLOW, J
FEBRUARY 13, 2024**

BETWEEN

AYAKA STEPHEN OLOO PETITIONER

AND

THE SPEAKER COUNTY GOVERNMENT OF MIGORI 1ST RESPONDENT

AFTATEEM MINING CO LTD 2ND RESPONDENT

JUDGMENT

1. The Petitioner herein is a Kenyan citizen and a resident of Macalder Township of Nyatike Sub County within Migori County, presenting the Petition on his own behalf and on behalf of the residents of Nyatike Sub County.
2. The 1st Respondent is the Speaker of the Migori County Assembly elected under Article 178 of *the Constitution*.
3. The 2nd Respondent is a Limited Liability Company currently looking for land for the purpose of refining and/or mining mineral resources.
4. The Petitioner herein filed a Petition dated 18th January, 2023; seeking the following Orders: -
 - i. An Order Declaring the Respondents in breach of Articles 10, 62(2), 71 as read together with section 14 of *Land Act*, No. 6 of 2012.
 - ii. An Order declaring the business conducted by the County Assembly of Migori on 14th June, 2022 unconstitutional, illegal hence null and void.
 - iii. An Order barring the 2nd Respondent from accessing, entering, taking ore or engaging in any mining activities at land parcel No. MUHURU/ KADEM/ 498.
 - iv. Costs.



5. The dispute herein relates to the allocation of public land and/or leasing of the suit land No. Muhuru/ Kadem/ 498 by the 1st Respondent to the 2nd Respondent for purposes of recycling mineral ore deposits.

Petitioner's Case.

6. It is the Petitioner's claim that the Respondents violated the provisions of Article 62(2) of *the Constitution* by approving the leasing of the suit land, which is a public land, to the 2nd Respondent for the purposes of carrying out mining activities when it had no requisite powers to do the same since *the Constitution* exclusively vests the said mandate to the National Government under the National Land Commission.
7. He further contends that the County Assembly breached the provisions of Article 71 of *the Constitution*, when it ratified an agreement for transaction relating to the grant of right or concession for exploration of Mineral Resources on public land, whereas the same can only be exclusively be ratified by the National Assembly. The County Assembly thus violated a fundamental requirement for the allocation of public land as provided under Section 14(1) of the *Land Act*. The County Assembly did not liaise with the National Government and the National Lands Commission as required by law.
8. He thus maintained that the lease transaction between the Respondents was never approved by the National Assembly as required by law. Further, that the members of the public were not invited for public participation before the appropriation of the public land to a foreign company.
9. It is therefore his claim that the decision by the Respondents was unconstitutional and a violation of the rule of law. He urged the court to allow his petition and grant the orders sought.
10. The Petition was opposed. The 1st Respondent filed his Notice of Appointment dated 20.09.2023 and a Replying Affidavit dated 9.10.2023 in response to the petition.

1st Respondent's Case

11. When the matter came up for mention on 20/9/2023, Mr. Mboya for the 1st Respondent sought leave of the court to file his response to the petition and he was granted 14 days within which to file the same. The 1st Respondent filed a Replying Affidavit sworn by Charles Owino Likowa on 09/10/2023. It was his claim that pursuant to Article 196(3) of *the Constitution*; County Assembly members are provided privileges and immunity in the course of their business and that the same cannot be questioned in any court.
12. It was his contention that the petition as filed is misplaced as the cause of action/ subject matter of the petition arose from the adoption of a report in the cause of business of the County Assembly presided by himself as the Speaker of the County Assembly.
13. He further stated the various Standing Orders enacted by the Migori County Assembly, regulating various procedures and in particular Standing Order 150 and 192; pursuant to which the Assembly conducted the business on the 11/5/2022 and which is subject of the suit herein.
14. He outlined the procedure followed by the Assembly, from the appointment of the Sectoral Committee, preparation of the Sectoral Schedule and the Report prepared by the said committee, which was tabled before the house on 14/6/2022. He maintained that the House adhered to all the provisions of the law when deliberating on the said report, including Article 62(2) of *the Constitution*.
15. It was further his contention that the law demands the county government to make a request to the National Land Commission and the said request must be approved by the County Assembly and that



is what the 1st Respondent presided over. The County Assembly consequently became functus officio upon approving the said Report with specific recommendations pursuant to Section 3(1) of the Land (allocation of public land) Regulation 2017.

16. In conclusion, he maintained that there was no breach of any fundamental requirement for the allocation of public land since the County Assembly only presided over the adoption of the report which recommended that the executive comply with certain provisions.
17. At paragraph 22, it was his claim that the petition is overtaken by events since the suit land has since been gazetted as a forest land and does not therefore belong to the County Government of Migori.

2nd Respondent's Case

18. The 2nd Respondent neither entered Appearance nor filed a response to the Petition and the allegations levelled against it.
19. The Petition was canvassed by way of written submissions; the Petitioner filed his written submissions dated 27.10.2023 together with authorities while the 1st Respondent filed his submissions and authorities dated 11.10.2023. I have read and considered the rival submissions.

Petitioner's Submissions

20. Counsel for the Petitioner submitted on 5 issues. The first issue was whether the petitioner had the requisite locus standing to institute the institution. It was counsel's submission that the petitioner is a resident of Macalder Township, where the public land is located and he has been adversely affected by the decision of the 1st Respondent to illegally allocate land to the 2nd Respondent.
21. On the second issue of whether this court is vested with requisite jurisdiction to hear and determine the petition in light of section 10 and 11(1) of the *County Assemblies Powers and Privileges Act*; it was counsel's admission that the said sections oust the jurisdiction of the court. However, it was his contention that the said sections contravene the provision of Article 48 on access of justice and the concept of supremacy of *the constitution*.
22. He maintained that courts are required by *the constitution* to ensure that all branches of the government act within the law and fulfil their constitutional obligations.
23. The third issue was whether the petition as filed attained the threshold of a constitutional petition. Counsel submitted that the petitioner stated with clarity the Articles of *the constitution* he is alleging to have been violated by the Respondents, the manner of the said violation and the jurisdictional basis for the petition.
24. He maintained that the 1st Respondent usurped powers exclusively held by the national government and administered by the National Land Commission on matters touching on the allocation of public land and thus contravened the provisions of Article 10 of *the Constitution*. Further, that there was no public participation of the area residents who were likely to be affected by the said decision as provided under Article 62(2), (3), section 87 of the County Government Act.
25. He thus maintained that the Petitioner had established a cause of action against the Respondents for being in contravention and violation of several provisions of *the constitution*.
26. On the fourth issue; counsel placed reliance on the provisions of Articles 62 (3), (4) and 67 of *the Constitution*, Section 5 of the *National Land Commission Act* and Sections 12(1), (7) and 14 of the *Land Act* and maintained that the County Government has no legal power to lease public land to a private investor.



27. In conclusion, it was counsel's submission that the Petitioner had proved his claim and urged the court allow the petition as sought with costs.

1st Respondent's Submissions

28. Mr. Mboya, counsel for the 1st Respondent submitted on 4 issues. The first issue was whether the Petition contravenes Article 178(1) and Section 10 and 11(1) of the [County Assemblies Powers and Privileges Act](#) and whether this court has jurisdiction to entertain the same. It was counsel's submissions that the Petitioner has erroneously invited the court to stop the 1st Respondent from undertaking his constitutional duty by presiding over the sittings of the Migori County Assembly and to further stop the County Assembly from performing their duty of oversight when acquiring a public land as provided in law. He relied on the provisions of Articles 178(2), 196(3) and section 10 of the [County Assemblies Powers and Privileges Act](#).
29. The second issue was whether the 1st Respondent complied with section 14(1) of the [Land Act](#). Counsel submitted that before the allocation was done, the relevant department under the County Assembly ensured that there was compliance with Regulation 3(1) and (2) of the Land (allocation of public land) Regulation 2017.
30. It was further his submission that the Petitioner did not consider that upon the County Assembly adopting the Committee report; the county assembly and the 1st Respondent became functus officio and any other proceedings, action or event was fully under the executive arm of the county government
31. On the fourth issue, it was counsel's submission that the petitioner erroneously sued the 1st Respondent for performing his constitutional duties and further misinterpreted the recommendations given in the adopted report. He thus urged the court to dismiss the petition with costs.

Analysis and Determination

32. I have carefully considered the Petition and the Affidavits in support by the Petitioner, the Replying Affidavit by the 1st Respondent and the annexures thereto, the rival submissions by the parties and the applicable law in totality. On that account, it is this court's considered view that the issues arising for determination are: -
- a. Whether this Court is vested with the requisite jurisdiction to hear and determine the Petition as filed.
 - b. Whether the Petition as filed meets the threshold of a Constitutional Petition.
 - c. Whether the Petitioner is entitled to the reliefs sought in the Petition.
- I. Whether this Court is vested with the requisite jurisdiction to hear and determine the Petition as filed
33. It is the 1st Respondent's contention that this court is not vested with the requisite jurisdiction to entertain the dispute as filed in the first instance, on account of the provisions of sections 10 and 11 of the County Assembly Powers and Privileges Act. To this end, he urged the court to dismiss the petition filed against him.
34. The Petitioner in response to the said allegations stated that the said provisions of the County Assembly Powers and Privileges Act contravenes the provisions of Article 48 of [the Constitution](#) which provides for access to justice and the concept of supremacy of [the Constitution](#).



35. Sections 10 and 11(1) of the County Assembly Powers and Privileges Act provides that: -
- “Section 10 - No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.
- Section 11(1) - No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.”
36. The 1st Respondent contends that the jurisdiction of this court is ousted on account of sections 10 and 11(1) of the County Assembly Powers and Privileges Act as outlined above. The proceedings contemplated under the said sections in my considered view; are proceedings against the members of the County Assembly in their personal/ individual capacity over official actions undertaken while holding office and conducting official duties and/or functions and not proceedings challenging decisions or procedures of the County Assembly while discharging their duties.
37. Consequently, it is my finding that this court is vested with the requisite jurisdiction to entertain the Petition as filed and I will proceed to determine the merits of the petition as hereunder.

II. Whether petition meets the threshold of a Constitutional Petition

38. This court is empowered to entertain the instant petition pursuant to Article 162(2) of *the Constitution* as read with section 13(3) of the ELC Act. Further, Article 22 of *the Constitution* guarantees the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Right has been denied, violated or infringed or is threatened.
39. It is now sell settled that in matters involving constitutional petitions; a petitioner must set out with reasonable degree of precision, the nature of the alleged violation, the person/ persons, authority or institution responsible for the violation, the manner of the violation or likely infringement and the provision of *the constitution* which creates and gives the constitutional right that is under violation or threatened violation. See Anarita Karimi Njeru vs Republic [1979] eKLR.
40. The question that therefore follows is whether the instant petition meets the above-mentioned criteria. Its is the Petitioners’ claim that the 1st Respondent violated the provisions of Article 62(2) of *the Constitution* by approving the leasing of the suit land, which is a public land, to the 2nd Respondent for the purposes of carrying out mining activities and exploration of mineral ores when it had no requisite powers to do the same. It is his assertion that *the Constitution* exclusively vests the said mandate to the National Government under the administration of the National Land Commission.
41. Further, it is their claim that the County Assembly breached the provisions of Article 71 of *the Constitution*; when it ratified an agreement for transaction relating to the grant of right or concession for exploration of Mineral Resources on public land whereas the same can only be exclusively ratified by the National Assembly.
42. It is the Petitioner’s contention that he stated with clarity the Articles of *the constitution* he is alleging to have been violated by the Respondents, the manner of violation and the jurisdictional basis for the petition.
43. As stated hereinabove; the petitioners must state the alleged violation of their rights with a degree of precision, name those responsible and include the provision of *the constitution* which creates the said right which has allegedly been violated or is threatened. From a cursory look of the petition; the



petitioners have specifically outlined how the procedure followed by the 1st Respondent in alienating and allocating the suit parcel L.R. No. Muhuru/ Kadem/ 498 to the 2nd Respondent, was contrary to the provisions of Article 62(2) of *the constitution*.

44. This in my view, meets the test as outlined in the famous Anarita Karimi case. Accordingly, it is my finding that the Petition herein meets the threshold of a constitutional petition.

III. Whether the Petitioner is entitled to the reliefs sought.

45. The Petitioner herein have sought for a declaration that the Respondents are in breach of Articles 10,62(2) and 71 of *the Constitution* as read with section 14 of the *Land Act* and further that the business of the County Assembly conducted on 14/06/2022 is unconstitutional, null and void. He has also sought an order restraining/ barring the 2nd Respondent from accessing, entering, taking ore or engaging in any mining activities on the suit land.

46. The 1st Respondents on the other hand maintained that business conducted by the Respondents was within the law and that they followed the right procedure in alienating and allocating the suit land to the 2nd Respondent.

47. In determining this issue, I will proceed to address the same on account of;

- i. The nature of the suit land,
- ii. Who is vested with the mandate of holding, administering and dealing with the said land
- iii. Whether the right procedure was followed before the suit land was alienated and allocated to the 2nd Respondent.

48. The Petitioner contends that the subject land is a public land with minerals and is therefore governed by provisions of Article 62(2) of *the Constitution*. The same is vested and/or held by the National government in trust for the people and is administered by the National Land Commission.

49. The 1st Respondent did not comment on the nature of the subject land; whether the same is a public land or even has minerals as alleged. It was however his contention that the process undertaken by the 1st Respondent was a prerequisite to the National Land Commission's process on administering the suit land. That all they did was to adopt the report made by the Sectoral Committee and make recommendations, which report was to be forwarded to the National Land Commission for further action.

50. It is common ground that the suit land falls under the category of a public land. It is also clear that the same has some minerals in it. The question that therefore follows is who holds the said land and is vested with the mandate to administer and deal with the same.

51. Article 62(2) and (3) of *the Constitution* provides as follows: -

“

- “(2) (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.”

52. A plain reading of Article 62(3) of *the Constitution* clearly states that any public land with minerals (sub-clause f) shall vest in the National Government to hold in trust for its people and the same shall be administered by the National Land Commission.
53. Article 67 of *the Constitution* establishes the National Land Commission and states among others the following functions: -
- a. to manage public land on behalf of the national and county governments;
54. The Petitioner contends that the County Assembly were not vested with the requisite mandate to conduct the business of alienating and allocating the suit land to the 2nd Respondent, which according to him solely lies with the National Land Commission. The Respondents on the other hand maintain that the business conducted by the House on 14/6/2022 was a prerequisite in compliance with Regulation 3(1) and (2) of the Land (allocation of public land) Regulation 2017 and hence the same is not unconstitutional.
55. I have looked at the regulations provided under the Land (Allocation of Public Land) Regulation 2017, particularly Regulation 3(1) and Regulation 9. The said regulations provide as follows: -
- 3(1) Pursuant to section 12 (I) of the Act, the Commission shall upon the request of the national or a county government, where necessary, allocate the whole or part of a specific public land by-
- 3(2) In determining the method of allocation the Commission shall, in consultation with the national government or respective county Government as the case may be, take into consideration all prevailing circumstances including the purpose for the allocation.
- 9(1) Allocation to a targeted group of persons. After giving notice, the county government shall vet the targeted group to ascertain the nature of the group’s disadvantaged position.
- 9(3) County Government shall then prepare a report on the disadvantaged nature of the group and recommend allocation of the identified to ameliorate the group’s disadvantaged position.
56. Having held that the County Assembly was not vested with the requisite mandate to allocate the land parcel to the 2nd Respondent, which is a preserve of the National Land Commission it follows therefore that the proper procedure was not followed and/or complied with.
57. Further, from a look at the said Report of June 2022 and which was subsequently tabled at the County Assembly and is subject matter of this suit; at page 12 which I reproduce herein verbatim;-
- “It is clearly stated that this County Assembly approves the leasing of 100 Acres of public land on parcel 498 Muhuru Kadem located at Macalder as defined under the following coordinates.
58. No evidence was adduced by the 1st Respondent to prove whether a request was made to the National Land Commission for the leasing of the said land to the 2nd Respondent. No proof has been provided of the steps taken pursuant to the said sitting of the house which approved the leasing whereas the approval was made in the year 2022 and the suit herein filed in 2023.



59. Further, it is the Petitioner's allegation that the 2nd Respondent has been taking ores and carrying out other activities on the suit land based on the approval given by the 1st Respondent as evidenced at page 12 of annexure "COL 3".
60. The 2nd Respondent did not respond to the Petition and the allegations raised therein of taking ores and/or carrying out other activities on the suit land.
61. In land transactions, process is everything. The procedure outlined under *the Constitution* and Statutes must be strictly complied with and followed to the letter. From a plain reading of Regulation 3(1) the process of allocating the public land may be initiated either by the National Government or the County Government, by requesting the allocation of a specific land. Nothing has been adduced by the 1st Respondent to show that a formal request was sent to the Commission, requesting the subject land to be allocated before the proceeding with meetings at the Committee level, preparation of the Report and subsequently adopting the said report.
62. Even though it is clear that no Lease has been issued to the 2nd Respondent over the suit land for the purpose of recycling Gold/ Copper waste, it is imperative to point out that the 1st Respondent did not strictly comply with the statutory provisions and regulations governing the allocation of public land with minerals.
63. In addition, it is the 1st Respondent's claim that the Petition had been overtaken events following the Gazettement of suit land as part of Forest land. I do note that no such Gazette Notice has been annexed to the Replying Affidavit and therefore this court may not be able to ascertain the correctness of the said averments. Be as it may, I wish to state that the issue of the Gazette Notice is subject to litigation currently in another matter before this court vide Migori ELC Petition No. 2 & 4 of 2023 and the said Notice has subsequently been stayed pending determination of the suit.
64. Consequently, it is my considered opinion that the Petitioner has proved his case to the required standard and is therefore entitled to the reliefs sought.

CONCLUSION

65. The upshot of the above is that the Petitioner has proved his case to the required standard and the Petition filed on 18th January, 2023 is hereby allowed on the following terms: -
- **i. A Declaration be and is hereby made that the Respondents are in breach of Articles 10, 62(2) & (3) and 71 of *the Constitution* as read together with section 14 of *Land Act*, 2012 No. 6 of 2012
 - ii. A Declaration be and is hereby made that the business conducted by the Second County Assembly of Migori on 14th June, 2022 is unconstitutional, null and void.*
 - iii. Further, an Order is hereby issued barring the 2nd Respondent from accessing, entering, taking ore or engaging in any mining activities at land parcel No. MUHURU/ KADEM/ 498
 - iv. On costs, this being a public interest litigation petition, each party shall bear their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED in open court at MIGORI this 13TH day of FEBRUARY, 2024.

MOHAMMED N. KULLOW

JUDGE

In presence of: -



Mr. Kisia for the Petitioner

Mr. Brian Mboya for the 1st Respondent

Court Assistants - Tom Maurice/ Victor

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