



**Mutuma & another v Meru County Chief Executive Committee Member Department of Lands, Physical Planning Housing, Urban Development & Public Works & another; Registered Trustees Ministry of Repentance & Holiness (Interested Party) (Petition E003 of 2024) [2024] KEELC 5097 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5097 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
PETITION E003 OF 2024**

**CK NZILI, J  
JULY 3, 2024**

**BETWEEN**

**GEORGE MUTUMA ..... 1<sup>ST</sup> PETITIONER  
JULIUS BUNDI KIRIMI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE MERU COUNTY CHIEF EXECUTIVE COMMITTEE MEMBER  
DEPARTMENT OF LANDS, PHYSICAL PLANNING HOUSING, URBAN  
DEVELOPMENT & PUBLIC WORKS ..... 1<sup>ST</sup> RESPONDENT  
DENNIS MUTEMBEI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE REGISTERED TRUSTEES MINISTRY OF REPENTANCE &  
HOLINESS ..... INTERESTED PARTY**

***(THE MERU COUNTY CHIEF EXECUTIVE COMMITTEE MEMBER DEPARTMENT OF LANDS, PHYSICAL PLANNING HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS.....1ST RESPONDENT DENNIS MUTEMBEI .....2ND RESPONDENT THE REGISTERED TRUSTEES MINISTRY OF REPENTANCE & HOLINESS .....INTERESTED PARTY)***

**JUDGMENT**

1. The petition before the court is dated 12.3.2024. The petitioners aver that they are bonafide owners of plot no. D & E respectively, situated in Timau Township, pursuant to letters of allotment issued to



- them by the Commissioner of Lands Ref No. 547, 95/iv dated 3.7.1996, where after they took vacant possession without complaints from any quarter.
2. The 1st petitioner avers that in 2023, the interested party sought for and was sold the subject plots, whereas the 2<sup>nd</sup> petitioner, on his part, leased out his plot to the interested party, took vacant possession of the two plots, and commenced developments thereon.
  3. In the process of developing the plots, the petitioners aver that the municipal manager of the respondent visited the locus in quo demanded stoppage of any developments thereon and which it obliged. Afterward, the petitioners aver that they were directed to surrender their allotment letters to the municipal manager's office who offered no solution but forbid the interested party from further developments.
  4. The petitioners aver that the interested party resumed development thereon. However, his workers were threatened and or intimidated by the respondents, who eventually the manager wrote a letter dated 29.11.2023 halting the developments until the National Land Commission verified the allotment letters and a part development plan was supplied to him.
  5. The participants aver that the decision made by the respondents was unilateral and arbitrary. It disregarded valid issued letters of allotment and denied them user rights of their plots, yet they were not the ones who had subdivided the plots in Timau Town, leading to the resultant part development plan and the area map.
  6. The petitioners aver that the respondents were the ones who issued the allotment letters in the first instance; they had no influence in the process, and the same government cannot turn around and claim that their documents are fake, illegal, or invalid yet the county government has continued to collect and accept annual land rates and rents from them.
  7. The petitioners based their petition on Article 19 (2) (3), 22 (1), 23 (3), 25, 27, 35, 47 (1), 50 & 259 (1)d of the constitution sections (3), (2) (3) & (7) of the ELC Act.
  8. The petitioners averred the right to a fair administrative action was violated for they were never accorded an opportunity to be heard, their ownership documents were dismissed as fake on face value, and their right to own property and deal with it as they wished has been frustrated.
  9. The petitioners sought:
    - a. Declaration that they were the bonafide owners of the plots.
    - b. The declaration that the unilateral action of the respondents to deprive and deny them the unconditional use and ownership of the land was unprocedural, illegal, and unfair.
    - c. Permanent injunction restraining the respondents from harassing or interfering with their ownership, occupation, and use of plots no. D & E Timau Township.
    - d. General damages for loss, use, exemplary, and aggravated damages.
  10. The petition was supported by an affidavit of George Mutuma dated 12.3.2024. The 1<sup>st</sup> petitioner avers that he bought residential plot no. D. Timau Township from Stephen Miriti Muguna in 2014 as per a sale agreement attached as annexure GM "1" who transferred to his letter of allotment and PDP marked as annexure GM 2 9a) & (b) and took vacant possession thereof.



11. Additionally, the 1<sup>st</sup> petitioner attached a copy of the sale agreement with the interested party Municipal manager's letters PDP Plan and the receipts as annexures marked GM "3", "4," & "5," and "6," respectively.
12. The petition is opposed by a replying affidavit sworn by Dennis Mutembei. It was averred that the suit properties were public utilities reserved for the defunct Timau County Council offices, but the 1<sup>st</sup> respondent file was interfered with and part of the record stolen.
13. The 1<sup>st</sup> respondent avers that on 3.6.2024, they wrote to the director of the land adjudication to authenticate the 1<sup>st</sup> petitioner's allotment letters, who orally confirmed that the document was not genuine since the suit property was a public utility. The respondents averred that the director of land adjudication declined to release a formal communication to that effect unless issued with a court order.
14. The respondents averred that the petitioners had declined to surrender the original letters of allotment for authentication, which, in any event, were mere letters of offer and could not be evidence of land ownership. The respondent termed the petition as misguided.
15. With leave of court, parties opted to canvass the petition through written submissions. The petitioners relied on written submissions dated 19.6.2024. It was submitted that, given the ownership documents adduced before the court, the respondents infringed and continued the right to ownership of the plots by stopping the developments thereon.
16. Further, it was submitted that under Sections 45 (1) & 51 of the *Physical and Land Use Planning Act*, the PDP in their custody was prepared by the 1<sup>st</sup> respondent representative, was approved, and has not been revived or amended to change the use of the land from the residential status.
17. The petitioners termed the contents of the 1<sup>st</sup> respondent's replying affidavit as double-speak, for they are expected to have in custody all the relevant information, and therefore National Land Commission would mean nothing if the 1<sup>st</sup> respondent have already concluded without proof that the letters of allotment were fake. The petitioners submitted that the respondents had no material to support the allegations that the documents of ownership were fake, illegal, irregular, or invalid.
18. The issues calling for my determination are:-
  - i. If the petition meets the constitutional threshold.
  - ii. If the petitioners have proved a breach of any constitutional rights and freedoms.
  - iii. If the petitioners are entitled to the reliefs sought.
19. A party seeking to enforce any breach, violation, or infringement of a constitutional right or freedom has to meet the constitutional, statutory and procedural parameters under Articles 19, 22, 23, 165 2(b), 258, and 260 of *the Constitution*, section 13 of the ELC Act and *the Constitution* of Kenya Protection of (Fundamental Rights and Freedom Procedure Rules 2013 (Mutunga Rules).
20. A petition must describe the party's nature of the rights and freedoms, infringed, violated or breached; manner of the breach, particulars thereof, loss and damage caused and whether there is a pending or previous suit involving the parties. In *Anarita Karimi Njeru vs Republic & others (1979) KLR 154*, *Mumo Matemu vs Trusted Society of Human Rights Alliance & others (2013) eKLR* and *Communications Commission of Kenya vs Royal Media Services Limited & 7 others (2014) eKLR*, the court underscored the need to plead a constitutional petition with specificity, precision, and clarity



so that the opposite party may know what is it complained about and for the court to know the issues at hand.

21. In this petition, the petitioners described the parties nature and particulars of the complaint, constitutional rights and freedoms infringed or likely to have been violated, and the reliefs sought. The respondents have been able to respond to the petition without seeking better particulars from the petitioners.
22. The next issue is whether the petition raises a constitutional question or controversy. A constitutional question is one whose answer flows from *the Constitution* but not a statute. Courts have held that not every infraction of the statutory rights or freedoms calls for the filing of a constitutional petition. A constitutional court should not be trivialized with the filing of all manner of disputes that may very well be handled through the ordinary manner set out by a statute. Similarly, courts should not be saddled with matters that should, as a first port of call, go to alternative dispute mechanisms available under statutes.
23. The primary question by the petitioners in this petition is whether the 1<sup>st</sup> respondent were justified to issue the letter dated 29.11.2023, halting any of the petition developments on Plot No. "E" & "D" Timau Township. The petitioners aver that they are bonafide allottees of the two parcels of land based on letters of allotment by the Commissioner of Lands and part development plans, which have been withdrawn and declared illegal and or invalidated. Hence, the acts of the 1<sup>st</sup> respondent halting the developments, so the petitioners opine, are contrary to Articles 40 and 47 of *the Constitution*.
24. Articles 19, 20, 21 & 22 of *the Constitution* grant a party the right to move to a constitutional court for redress whenever his or her constitutional rights and freedoms have been violated, infringed, or threatened with breach. In this petition, the petitioners were not supplied with any evidence showing that their ownership documents were invalid, illegal, and related to land already reserved for public utility. Again, even if that was the case still, the law requires a fair hearing to be availed to the petitioners before their land is taken for public use. Constitutional rights may be violated or infringed by state and non-state agencies or individually.
25. The question posed by the petitioners, therefore, calls for the court to establish if the actions of the respondents pass the constitutional test as to the Fair Administrative Actions Act and the right to protection of property under Articles 47 and 40 of *the Constitution*.
26. A constitutional petition under the Mutunga Rules has to be supported by an affidavit and documents in support of the allegations or evidence. In this petition, the petitioners have annexed documentary evidence that shows that they were lawfully and regularly allocated and acquired the suit parcels of land from the defunct Commissioner of Lands.
27. There is evidence that the respondents have been collecting land rates and rents from the petitioners. In the response, the 2<sup>nd</sup> respondent terms the documents of ownership in possession by the petitions as irregular and unprocedurally issued or acquired, for land that is a public utility. In the letter dated 29.11.2023, the 1<sup>st</sup> respondent terms the alleged plot No. "D" Timau Township an illegally subdivided from the plot proposed for county community offices as per the attached Part Development Plan. The attached PDP lacks the approval dates stamp and approved development plan number.
28. In the replying affidavit, the deponent refers to an oral or verbal confirmation by the director of land adjudication that the letters of allotment held by the petitioners were irregularly acquired. The 1<sup>st</sup> respondent have not availed any documentary evidence to impeach the letters of allotment held by the petitioners on account of illegality, fraud, irregularity, and as a result of issuance through a corrupt scheme. He who alleges must prove under Sections 107, 111 of the *Evidence Act*.



29. Article 40 of *the Constitution* provides that every person has the right to acquire and own property of any description anywhere in Kenya. Similarly, the state should not deprive a person of property without recourse to a court of law. Article 47 thereof provides that, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Further, Article 47 (2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action the person has the right to be given a written reason for the action.
30. In this petition, the petitioners were stopped from developing their plots. In the letter dated 29.11.2023, the 1<sup>st</sup> respondent halted any developments in Plot No. D Timau Township, for it had been illegally subdivided from the plot proposed for council offices.
31. In *William Kabogo Gitau vs. George Thuo & others* (2010) 1 KLR 526, the court said that a case may be determined in favor of a party who persuades the court that the allegations he pleaded in his case are more likely to than not to be what took place. In *Dr. Arap Ngok vs Moiyo Ole Keiwua & others* (1997) eKLR, the court held that when a title to land is in dispute, every paper trail towards its acquisition becomes an issue. In *Republic vs City Council of Nairobi & others* (2014) eKLR, the court observed that once an allotment is issued and the allottee meets the conditions set therein, the land is no longer available for re-allocation since an allotment letter confers an absolute right of ownership unless challenged by the allocating authority on account of fraud, mistake, misrepresentation or illegality. See *Republic vs Municipal Council of Garissa Exparte Mohammed Salat & others* (2014) eKLR and *Rukaya Ali Mohamed vs David Gikongo & another Kisumu HCCA No. 9 of 2004*.
32. The petitioners have produced a letter of allotment accompanied by a part development plan duly issued and approved by the Commissioner of Land. Under the defunct Government Lands Act, Section 117 of the retired Constitution, as read together with Section 53 of the Trust *Land Act*, the Commissioner of Lands had the mandate to alienate land on behalf of a county council. The essential documents required would include a request for a plot, inquiry of availability of the plot, letter of allotment, compliance thereof, part development plan beacons certificate, deed plans, and full council minutes. See *Rinya Hospital Ltd vs. Awendo Town Council and others* (2010) eKLR, *Mary Mukami Kariithi vs Dentopak Agencies Ltd & others* (2021) eKLR and *Moses Okatch Owuor & another vs AG & another* (2017) eKLR.
33. The respondents are not the issuing authority of the letters of allocation and the part development plan. The petitioner's cause of action is the letter issued by the 1<sup>st</sup> respondent halting their developments on the basis that the petitioners plots were illegally subdivided on land proposed for county council offices.
34. Article 47 of *the Constitution* requires that the respondents accord the petitioners an expeditious, lawful, reasonable and procedurally fair administrative action and give written reasons for the administrative action. The 1<sup>st</sup> respondent put a rider in the letter that there would be no developments on the land unless the petitioners caused the letters of allotment to be certified by the National Land Commission.
35. The mandate of the National Land Commission is defined under Article 67 of *the Constitution*. There is no evidence by the respondents that they subjected themselves to the National Land Commission to investigate a complaint that the town Plots No's. E & D were illegally or irregularly allocated on land already reserved for public utilities.
36. In *Wareham t/a A.F Wareham & others vs Kenya Posts Office Savings Bank* (2004) 2 KLR 91, the court said the burden of proof is on the plaintiff who has discharged it through evidence of existence or non-existence of the facts in issue or facts relevant to the issue. In the County Government of Kakamega



- vs Josephat Shikoro Shijenje (2019) eKLR, the court was dealing with Sections 36, 41 & 52 of the repealed Physical Planning Act as to subdivision, land use plans, change of user and application for development.
37. The court cited NEMA & another vs Gerick (K) Ltd (2016) eKLR that public interest overrides the private interest if the issue is for the good of the broader public as opposed to a narrow private interest.
  38. In this petition, the respondents are unable to tender any reasons before this court why the petitioners cannot develop their plots. It is the National Land Commission that manages public land on behalf of county and national governments. The role of the director of land Adjudiciaotn in relation to the suit plots has not been substantiated.
  39. Part VIII of the *Land Act* relates to the compulsory acquisition of land required for public purposes. If the respondent has proposed the two plots to form part of the proposed county council offices, then the respondents have to comply with Article 40 (3) of *the Constitution*.
  40. The notice of intention to compulsorily acquire the photos has not been substantiated by way of a gazette notice. See Patrick Musimba vs National Land Commission & others (2017) eKLR. In the Municipal Council of Eldoret vs Titus Gatitu Njau (2020) eKLR at issue was a notice or threat to demolish developments on a plot. The respondent had termed the threat as unlawful, aggressive and an infringement of his rights to ownership of the plot. The court cited County Government of Meru vs Isaiah Mugambi M'Muketha (2017) eKLR, where the court held that since the buildings on the suit premises had received approval, which evidence was not rebutted by the county government, liability was merited against the appellants for interference with the respondent's quiet enjoyment of the suit premises.
  41. The court cited Sections 29 & 38 of the repealed Physical Planning Act that a local authority had the power to prohibit or control the use and development of land and buildings in the interests of properties and orderly developments of its area.
  42. In this petition, the respondents failed to issue the notice under the provisions of the Physical Land Use Planning Act. Rules of natural justice and fair administrative action required that the petitioners be given notice of the intended stoppage and reason for the decision. No enforcement notice was served upon the petitioners. The respondents failed to involve the liaison committee or the National Land Commission. The petitions seek to have the decision halted for non-compliance with *the Constitution*.
  43. In *Sinopec International Petroleum Service Corporation vs Public Procurement Administrative Review Board & others (Civil Appeal E012 of 2024)* (2024) KECA 184 (KLR) (23<sup>rd</sup> February 2024) (Judgment), the court observed that an award of a tender constitutes an administrative action governed by the *Fair Administrative Action Act*. It proceeded to quash the decision to file against the law. In this petition, the petitioners were not accorded a fair hearing or given reasons why their letters of allotment were illegal and justification for half the development thereon.
  44. Looking at the 2<sup>nd</sup> respondent's decision, it is evident that it was unfair, illegal, unprocedural, irregular, and unreasonable. The evidence showing the illegality of the subdivisions and the plots as reserved for county offices has not been tendered before this court. Justification for the action and tangible reasons for the decision were not and have not been availed before this court as required under Sections 9,10, and 11 of the Fair Administrative Actions Act.
  45. The upshot is that I find the decision and manner it was arrived at susceptible to orders of judicial review. The decision dated 29.11.2023 is, as a result of this, quashed and vacated.



46. As to prayers numbers (1), (iv) & (v) of the petition, the petitioners did not attach any documents to show that there was full compliance with the law leading to the issuance of a certificate of the lease, approved developments plans, issuance of development permits and licenses by NEMA National Construction Authority and the County Government of Meru.
47. Evidence was not led on any special general exemplary and aggravated damages. In *Gitobu Imanyara & others vs AG (2016) eKLR*, the court observed that the primary purpose of a constitutional remedy is not compensatory or punitive but to vindicate the rights violated and to prevent or deter future infringement.
48. In *Kenya Agricultural Research Institute (KARI) vs Peter Wambugu Kariuki & others Nakuru Civil Appeal No. 315 of 2015*, the court said that an appropriate remedy need not be prayed for before it is granted. See *Commissioner on Administrative Justice vs Kenya Vision 2030 Delivery Board and others (2019) eKLR*.
49. The upshot is that I grant prayer number II of the petition. Costs to the petitioner.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 3<sup>RD</sup> DAY OF JULY, 2024**

**In presence of**

C.A Kananu/Mukami

Maheli for petitioner & interested party

**HON. C K NZILI**

**JUDGE**

