



**Mebarne & 109 others v County Government of Narok & 3 others (Environment & Land Petition E002 of 2023) [2024] KEELC 6542 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6542 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND PETITION E002 OF 2023**

**CG MBOGO, J**

**OCTOBER 8, 2024**

**IN THE MATTER OF ARTICLE 1,2,10(2), ARTICLES 22(1)  
(2),23(3),47,62(1)(2)(4), 68 162(2)(B), (3),186, AND PARAGRAPH 8(B),  
PART 2 FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT, NO. 19 OF 2011**

**AND**

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF FAID ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

**AND**

**IN THE MATTER OF THE PARCEL OF LAND KNOWN AS KIPISE LAND REFERENCE  
NUMBER 38 AND SUBDIVISIONS CREATED THEREUNDER KNOWN AS KIPISE  
LAND REFERENCE NUMBER 3490 AND KIPISE LAND REFERENCE NUMBER 3491**

**BETWEEN**

**PAUL TAPUKAI OLE MEBARNE & 109 OTHERS & 109 OTHERS & 109  
OTHERS & 109 OTHERS ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF NAROK ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY LAND REGISTRAR, NAROK COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SURVEYOR NAROK COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF SURVEYS ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The petitioners filed the petition dated 3<sup>rd</sup> August, 2023 seeking the following orders: -
  1. A declaration that Cis Mara/ Kipise/ 38 is public land reserved for the development of public utilities.
  2. A declaration that the subdivision of CisMara/ Kipise/ 38 a public land by the respondents;
    - a. Without conducting public participation; and
    - b. Without involving the National Land Commission is unlawful and unconstitutional.
  3. An order of certiorari do and is hereby issued to quash the decision of the respondents to subdivide CisMara/ Kipise/ 38 into Land Reference Number Cis Mara/ Kipise/ 3490 and Cis Mara/ Kipise/ 3491.
  4. An order be issued directing the County Government of Narok, the 1<sup>st</sup> respondent to develop a public market on Cis Mara/ Kipise/ 38.
  5. A permanent injunction be issued restraining the respondents, their servants, agents or any person acting on their behalf from alienating, selling, allocating or dealing in any manner whatsoever all that parcel of land known as Cis Mara/Kipise/38 other than for public use.
  6. The respondents pay the costs of the petition.
2. The facts of the petition as stated by the petitioners are that the 1<sup>st</sup> respondent reserved land reference number Cis Mara/ Kipise/ 38, a public land, for public utilities including the establishment of a market centre known as Mpeuti Trading Centre. That thereafter, the 1<sup>st</sup> respondent prepared a local physical development plan showing the specific plots designated for public purposes including plots reserved for commercial purposes in Mpeuti Trading Centre.
3. The petitioners contended that the 1<sup>st</sup> respondent erected a fence and a gate, and in June and July, 2022, each petitioner paid Kshs. 10,000/- to the 1<sup>st</sup> respondent for survey and allocation of the specific plots after which they were allocated the said plots in the trading centre. Further, that they had legitimate expectation to start operating in their plots after the 1<sup>st</sup> respondent opened the same. However, instead of opening the market, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents unlawfully and unprocedurally subdivided the said public land, and allocated it to private individuals without conducting any public participation and without the inclusion of the National Land Commission which has the mandate under Article 67 (2)(a) of the *Constitution*.
4. The petitioners contended that the respondents have altered the index map to reflect the subdivision by introducing new parcel numbers known as Cis Mara/ Kipise3490 and Cis Mara/ Kipise/ 3491. They contended that they were not given prior notice, nor were they accorded a right to be heard before the land was subdivided. That despite the suit land being public land, the private individuals with the approval of the 1<sup>st</sup> and 2<sup>nd</sup> respondents are cultivating the land for their private gain, and they are apprehensive that the respondents will continue to subdivide, sell, lease and alienate the new parcels of land emanating from the subdivision of the public land to private individuals.
5. They contended that private individuals are on the land destroying public infrastructure including the fence erected thereon. The petitioners averred that to the extent that the respondents did not conduct public participation, they contravened the provisions of Article 10 (2) of the *Constitution* and



Article 67 (2)(a) for failing to involve the National Land Commission. Further, they decried violation of Article 47 of the *Constitution* on their right to be heard and alienation of public land reserved for public purposes to private individuals for their private use violated the provisions of Article 62 (2) of the *Constitution*. Further, that in permitting and conniving with private individuals to do farming using public funds, the respondents failed to comply with the principle governing public finance on prudent use of public funds in contravention of Article 201 (d) of the *Constitution*.

6. The petition was supported by the affidavit of the 1<sup>st</sup> petitioner herein sworn on even date. The averments raised by the 1<sup>st</sup> petitioner as contained in the supporting affidavit is similar to the factual background of the petition. I see no need of rehashing the same.
7. Despite service of the petition as well as the supporting documents as evidenced by the return of service, the respondents did not file a response to the petition. As it is the petition is unopposed.
8. The petition was canvassed by way of written submissions. The petitioners filed their written submissions dated 9<sup>th</sup> July, 2024, where they raised four issues for determination as listed below: -
  - i. Whether the County Government of Narok set aside Cis Mara/ Kipise/ 38 for public purposes.
  - ii. Whether the action of the County Government of Narok of preparing the local physical and land use development plan, and requesting the 1<sup>st</sup> to 110<sup>th</sup> petitioners to pay Kshs. 10,000/- for specific plots within commercial (sub zone 5) within Mpeuti Trading Centre created a legitimate expectation that the specified plots would be used for trading activities.
  - iii. Whether the County Government of Narok ought to have conducted public participation before subdividing Cis Mara/ Kipise/ 38.
  - iv. Whether this honourable court should issue a prerogative order of certiorari to quash the sub division of Cis Mara/ Kipise/ 38 and creation of two land reference numbers Cis Mara/ Kipise/3490 and Cis Mara/Kipise/3491.
9. On the first issue, the petitioners submitted that it is uncontroverted that the suit land was set aside for a trading centre and public utilities as reflected in the local physical and land use development plan prepared by the 1<sup>st</sup> respondent in accordance with the *Physical and Land Use Planning Act*. They submitted that the respondents have not adduced evidence of any revised plan for the suit land to disapprove their assertions. The petitioners submitted that the burden of proof on whether the suit land was to be utilized other than as showed in the local physical and land use development plan lies with the 1<sup>st</sup> respondent who has not challenged the plan which they have relied on in support of their case. They relied on the case of *Kyallo Elly Joy versus Samuel Gitahi Kanyeri* [2021] eKLR and *Kenya Anti-Corruption Commission versus Frann Investment Limited & 6 Others* [2020] eKLR, and further submitted that the plan though unsigned is uncontroverted and unchallenged.
10. On the second issue, the petitioners submitted that they paid Kshs. 10,000/- for purposes of acquiring specific plots with the commercial zone of Mpeuti Trading Centre, and therefore, there was legitimate expectation that the 1<sup>st</sup> respondent would come up with a framework and guidelines for creating the market centre to enable them conduct trading. While relying on the cases of *Kenya Revenue Authority versus Export Trading Company Limited* [2022] eKLR, the petitioners submitted that the 1<sup>st</sup> respondent prepared the plan which they used to call for payment of specific plots within the commercial zone. Further, that they had legitimate expectation that after paying for the specific plots, the 1<sup>st</sup> respondent would come up with a framework for the market centre. Further, that once land is



reserved for public use, the same cannot be allotted for private use without change of user or another part development plan being prepared.

11. On the third issue, the petitioners submitted that public participation is a requirement where the respondents utilize their statutory powers to make decisions that have an impact on the public. Further, they submitted that they are apprehensive that the suit land that was meant for public utilities has been alienated by the 1<sup>st</sup> respondent to private persons who are now cultivating the land without consultation with the National Land Commission. Reliance was placed in the cases of Republic versus Commissioner of Lands & 4 Others ex parte Associated Steel Mill [2014] eKLR and Muthaiga North Residents Association versus Nyari House Limited; National Land Commission and Another (Interested Parties) [2022] eKLR.
12. On the fourth issue, the petitioners submitted that the respondents have not disputed that they subdivided the land which is being used by private individuals for farming activities. Further, that if there is any amendment of the plan, the respondents ought to have conducted public participation in light of the provisions of Section 51 (2) of the [Physical and Land Use Planning Act](#) read with Section 42 (5). The petitioners urged the court to grant the orders sought and they relied on the case of Republic versus Public Procurement Administrative Review Board & Another ex parte Intertek Testing Services (EA) Pty Limited & Authentix Inc; Accounting Officer; Energy and Petroleum Regulatory Authority & Another [2022] eKLR.
13. I have considered the petition, the documents relied on in support of the petition and the written submissions filed by the petitioners. I am of the view that the issue for determination in my view is whether the petitioners have proved their case to warrant the orders sought.
14. The threshold for a constitutional petition was summarized in the case of Anarita Karimi Njeru versus Republic [1979] eKLR, where it was held as follows;

“We would, however, again stress that if a person is seeking redress from the high court on a matter which involves a reference to the [Constitution](#), it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” With emphasis.

15. Also, in *Ostenah Ogero Taracha versus Ethics & Anti-Corruption Commission & Attorney General* [2017] eKLR the court held that:

It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the [Evidence Act](#) Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited to the cases of *Anarita Karimi Njeru –vs- Republic* [1979] eKLR and *Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint



with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.”

16. As can be seen above, it is trite that whoever alleges must prove the said allegations, as provided under Section 107(1) of the [Evidence Act](#), which states: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

17. In this case, the petitioners contended that Cis Mara/Kipise/38, the suit land, is held in trust by the 1<sup>st</sup> respondent for the residents of Narok County, and it has been reserved for public utilities including the establishment of a market centre known as Mpeuti Trading Centre. It was their case that through a local physical development plan prepared by the 1<sup>st</sup> respondent, there were specific plots designated for commercial purposes and that the 1<sup>st</sup> respondent erected a fence and a gate around the market centre. On various dates between the months of June and July, 2022, the petitioners paid Kshs. 10,000/- for survey and allocation of specific plots, wherein they were allocated various plots as shown in the table in the petition. Whereas the petition is not opposed, it is not automatic that the orders would issue, but that the petitioners have to prove that indeed they are deserving of the orders.

18. Under Section 2 of the [Land Act](#) “alienation of public land” means alienation of land by either the National Government or the County Government as the case may be, by way of issuance of a letter of allotment by the National Land Commission to any person to hold the land either under leasehold or freehold tenure.

19. It therefore means that if at all the suit land is public land, there ought to have been documentation to that effect. This means that there is a register kept or in place for such use. Section 8 (1) of the [Land Act](#) provides: -

- “(1) In managing public land on behalf of the national and county governments, the commission—
- (a) shall identify public land, prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for survey;
  - (b) shall evaluate all parcels of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning; and
  - (c) shall share data with the public and relevant institutions in order to discharge their respective functions and powers under this Act; or
  - (d) may require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument.



20. In allocation of public land to members of the public for commercial use, the procedures in doing so is detailed under Section 12 and 14 of the [Land Act](#). Section 14 of the [Land Act](#) provides: -

- “(1) The commission shall, before allocating any public land under this Act, issue, publish or send a notice of action, to the public and interested parties, at least thirty days before, offering for allocation, a tract or tracts of public land.
- (2) The notice under subsection (1) shall include the terms, covenants, conditions and reservations which are to be included in the conveyance document and the method of allocation.
- (3) The notice under subsection (1) shall provide a period of fifteen days from the date of its issuance, within which the public and interested parties may comment.
- (4) At least thirty days prior to the allocation of public land, the commission shall send a notice to the governor in whose county the public land proposed for allocation is located and to the head of the governing body of any administrative subdivision having development control or other land use regulatory responsibility in the geographic area within which the public lands are located and to the head of any administrative subdivision having administrative or public services responsibility in the geographic area within which the lands are located.
- (5) The notice under subsection (4) shall be sent to other known interested parties including, but not limited to, adjoining landowners, persons in actual occupation of the land including—
  - (a) marginalised communities and groups living in the general vicinity of the public lands being proposed for allocation; and
  - (b) boards of cities and municipalities and town administrators, created under sections 12, 13 and 31 of the [Urban Areas and Cities Act](#) (Cap. 275), in the geographic vicinity within which the public lands proposed for allocation are located.
- (6) The notice under subsection (4) shall be published in the Gazette and at least once a week for a period of three weeks and thereafter shall be published in a newspaper of general circulation in the general vicinity of the public land being proposed to be offered for allocation.
- (7) A notice under this section above shall specify the place, date, and time of allocation, the appraised value of the land, describe with particularity each parcel of land to be allocated, and specify that the terms of allocation shall be available in the commission’s offices in Nairobi and the commission office nearest the land being proposed for allocation.
- (8) Failure to provide notice of proposed allocations as required under this section shall serve as grounds for the commission to—
  - (i) require that the notification procedures outlined in this subsection be repeated; or



- (ii) void the allocation on grounds that the notification requirements of this Act were not properly conducted.”

21. Section 12 of the Act provides as follows: -

- 1.I. Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the commission for the necessary action by way of—
  - (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
  - (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;
  - (c) public notice of tenders as it may prescribe;
  - (d) public drawing of lots as may be prescribed;
  - (e) public request for proposals as may be prescribed; or
  - (f) public exchanges of equal value as may be prescribed.
2. The commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—
  - (a) public land that is subject to erosion, floods, earth slips or water logging;
  - (b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;
  - (c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;
  - (d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and
  - (e) natural, cultural, and historical features of exceptional national value falling within public lands;
  - (f) reserved land; or
  - (g) other land categorized as such, by the commission, by an order published in the Gazette.
3. Subject to Article 65 of the *Constitution*, the commission shall upon the request of the national or a county government set aside land for investment purposes.
4. In fulfilling the requirements of subsection (3), the commission shall ensure that the investments in the land benefit local communities and their economies.
5. Subject to the *Constitution* and any other law, the commission may, in consultation with the National and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations.



6. At the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.
7. Public land shall not be allocated unless it has been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 17 of this Act.
8. Public land allocated under this section shall not be sold, disposed off, subleased, or subdivided unless it is developed for the purpose for which it was allocated.
9. Where the land allocated under subsection (8) is not developed in accordance with the terms and conditions stipulated in the lease, that land shall automatically revert back to the national or county government, as the case may be and the commission shall include in its annual report the status of implementation of this subsection.
10. In an allocation of public land under this section, the commission may impose any terms, covenants, stipulations and reservations that the commission considers advisable, including—
  - (a) that the applicant shall personally occupy and reside on the land for a period set by the commission;
  - (b) the applicant shall do such work and spend such money for permanent improvement of the public land within the period specified by the commission; or
  - (c) the consideration that must be paid for a disposition of public land.
11. The commission shall make regulations prescribing the criteria for allocation and for connected matters.
12. The commission shall make regulations prescribing the criteria for allocation of public land and without prejudice to the generality of the foregoing, such regulations may prescribe—
  - (a) forms of ownership and access to land under all tenure systems;
  - (b) the procedure and manner of setting aside land for investments;
  - (c) procedures to be followed with respect to auction and disposition of land;
  - (d) appropriate mechanisms for repossession of land given to citizens at the expiry of a lease; and
  - (e) mechanisms of benefit sharing with local communities whose land have been set aside for investment.”
22. In applying the above provisions of the law to the circumstances of this case, it is my view that the petitioners have not discharged the burden of proof required. The documents sought to be relied on are not satisfactory in nature. First, they have not disclosed whether there was notice informing the members of the public of the intention of the 1<sup>st</sup> respondent to alienate public land for commercial use. Secondly, the list as generated has no source, how will the court discern that this is the list of the members of the public who paid the requisite fees. In addition, the receipts which are paid to the 1<sup>st</sup> respondent indicates that Kshs. 10,000/- was for ‘survey and showing’. I have not seen any receipt indicating allocation of plot or a letter by the 1<sup>st</sup> respondent allocating the various plots to the petitioners. The plan is not dated and neither is it signed. How will the court discern which department this document originated from.



23. In a nutshell, the petitioners have not proved sufficiently, the manner in which the cited provisions of the law have been violated. The petition dated August 3, 2023 is hereby dismissed. Each party to bear its own costs. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. MBOGO C.G. JUDGE**

**08/10/2024.**

**In the presence of: -**

Mr. Meyoki Pere – C. A

