



**Murithi ((Suing as the legal representative of Benjamin M’Murithi M’Muketha alias Benjamin Murithi (Deceased)) v County Executive Committee Member for Lands, ICT and Planning & another (Petition 31 of 2015) [2023] KEELC 660 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 660 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
PETITION 31 OF 2015  
CK NZILI, J  
FEBRUARY 8, 2023**

**BETWEEN**

**ANDERSON MWIRIGI MURITHI ..... PETITIONER  
(SUING AS THE LEGAL REPRESENTATIVE OF BENJAMIN M’MURITHI  
M’MUKETHA ALIAS BENJAMIN MURITHI (DECEASED))**

**AND**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, ICT AND  
PLANNING ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF MERU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through an amended petition dated 14.2.2022, the petitioner as the legal representative of the estate of Benjamin M’Murithi M’Muketha alias Benjamin Murithi (hereafter the deceased) averred that the deceased was the recorded owner of LR No. Kibirihcia/Kibirichia/634 measuring 0.44 ha which was allocated to him by the 2<sup>nd</sup> respondent on 9.6.1965. It was pleaded that the deceased took vacant possession, settled his family and made various developments therein. The petitioner went on to state that he was served with an enforcement notice by the respondents on 23.9.2015, threatening to demolish his said developments and take over the land alleged to be public land.
2. The petitioner averred that the said notice and actions by the respondents offended, threatened and amounted to a breach of his rights under Articles 40 (1) & (2), 47 (1) and (2) and 48 of *the Constitution*. He therefore prayed for declaratory orders that the suit property was part of the deceased estate which was lawful and procedural allocation. He also sought for a permanent injunction restraining the respondents from in any way whatsoever interfering with his quiet and peaceful occupation and ownership of the suit land.



3. The petition was accompanied by supporting affidavit sworn on 12.11.2015 where he attached copies of the limited grant, minutes on the allocation, an enforcement notice, reply to the notice, subsequent notice and the Ndungu Report as annexures marked AMM “1-6” respectively. Further, the petitioner filed a supplementary affidavit sworn on 12.4.2016, witness statements and list of documents dated 2.6.2018
4. The respondents through a replying affidavit sworn on 10.3.2016, a further reply sworn on 13.5.2016, list of witness’s statements and documents dated 10.7.2018 to oppose the petition. It was the respondent’s case that the suit land was registered in 1964 under the name of the 2<sup>nd</sup> respondent and reserved for Karanene Canteen as per the copy of search attached as MB “1”. Consequently, the respondents took the view that the suit land could not be allocated to or be owned by the petitioner more so based on unauthenticated allocation council minutes since as at 4.12.2013 the record of ownership reflected that the land belonged to the 2<sup>nd</sup> respondent.
5. The respondents averred that the only time the deceased together with others attempted to apply for the said plot was in 1998 but the application was deferred for not meeting the requisite physical planning process as per the minutes attached as annexure MB “2”, which contrary to the petitioner’s assertion, a sub county administrator was not a legal custodian of the minutes or capable of certifying them as a true record.
6. The respondents therefore maintained that there could not have been any alleged interference with the rights of the petitioner since the 2<sup>nd</sup> respondent was the true owner of the land, as a successor to the defunct County Council of Meru. It was averred that in exercise of its ownership rights, the 2<sup>nd</sup> respondent was in order to issue a notice to vacate the land to the petitioner and to order for the removal of all illegal construction thereon since the same were carried out in breach of the physical planning law.
7. The respondents averred that as the legitimate and registered owners of the land which was held in trust for the people of Meru County, it was within their purview to issue the notice more so since the developments thereto were never sanctioned or expressly authorized by it or its predecessors in title. Additionally, the respondents averred that the petitioner knew the land was public in nature hence the petition herein lacked any merits.
8. As a response to the replying affidavit, the petitioner in filed a supplementary affidavit sworn on 12.4.2016 and insisted that the minutes of 9.6.1965 were genuine, otherwise the respondents would not have been accepting land rates and rent which receipts he annexed as AMM “1” and also allowed his developments thereto as per photographs annexed as ANM “2”. Further, the petitioner averred that if the suitland never belonged to his late father there, would have been an eviction notice and a claim for mesne profits. Lastly, the petitioner attached as annexure marked AMM “3”, the approved building plans.
9. Reacting to the supplementary affidavit, the respondents filed another replying affidavit sworn on 13.5.2016 by Martin Bikuri. The respondents insisted that there was no allocation of the Suitland in the first instance, based on minutes purported to be dated 9.6.1965, otherwise the deceased would not have made another application in 1998 as per the extracted minutes dated 25.6.1998. The respondents denied that they ever received any rates or rents as alleged since the receipts produced were clear that the petitioner only rushed to pay the same after the petition was filed which was irregular and the respondents were ready and wiling to make a refund.
10. The respondents reiterated that the alleged developments were not illegal but also lacked any sanction from them, which plans attached were never approved by them nor could they be used as a proof of allocation.



11. With leave of court, parties agreed to canvass the petition by way of viva voce evidence and to maintain the status quo till the determination of the petition. Thereafter, parties filed a paginated bundle of records dated 7.6.2018 and 26.7.2018.
12. The petitioner testified as PW 1 adopting his affidavit and witness statement alluded above as his evidence in chief. PW1 also produced his list of documents contained in the paginated bundle dated 7.6.2018 namely a limited grant as P. Exh No. (1), minutes dated 8.6.65 and 8-10/6/1965 as P. Exh No. (2) and (3), photographs as P. Exh No. (4), approved plans as P. Exh No. (5) and (6), an enforcement notice dated 23.9.2015 as P. Exh No. (7), letters dated 8.10.2015 and 2.10.2015 as P. Exh No. (8) & (9), an extract of Ndugu Report as P. Exh No. (10), receipts for rates payment dated 19.2.2016, 15.3.2017 and 20.3.2018 as P. Exh No's. (11-13) and a confirmed grant as P. Exh No. (14). The petitioner insisted that the land was never public land.
13. In cross examination by the respondents, PW 1 admitted that his late father used to be a councilor in 1991. He denied that his late father had used his position to acquire and enter the public land. Similarly, PW1 also admitted that his approved plans and the allotment letter were materially different.
14. PW 1 could not tell if his late father made the application for a plot in 1998 but was certain since 1965 to the present, he was never served with an eviction notice by the respondents since the land was agricultural and not a commercial plot.
15. PW 2 was Julius Mbogua Marete. He adopted his witness statement dated 7.6.2018 as his evidence in chief essentially repeating the petitioner's testimony. PW2 confirmed that as a neighbour he knew for certain that the land was legally allocated to him in 1965, who took vacant possession and extensively developed it until the time he was served with an enforcement notice out of instigations or confrontation by the area Member of County Assembly to vacate the land.
16. PW 3 was Samuel Marangu Mbogori. He adopted his witness statement dated 7.6.2018 as his evidence in chief. He reiterated the evidence of PW 1 and PW 2 that the land was lawfully allocated, occupied and or developed by the petitioner deceased father, who was his uncle.
17. DW 1 was Ednah Kawira Mutwiri a land and settlement officer working with the 2<sup>nd</sup> respondent. She relied on her witness statement dated 16.8.2022 following the setting aside of the evidence of Jackson Mukaria Muriungi who was previously listed as a defense witness, who had been stood down, and reportedly said to have left the employment of the 2<sup>nd</sup> respondent. She produced a copy of official search for the land as D. exh (1) and minutes dated 25.6.1998 ad D. Exh No. (2). Adopting the official report as contained in the replying affidavits to the petition, DW 1 told the court that the land was never allocated to the petitioner as alleged since it was registered in favour of the 2<sup>nd</sup> respondent on 15.6.1964. The alleged payments of rates by the petitioner with effect from 2015 as per P. Exh No's. 11, 12 & 13, DW 1 said it was erroneously received by the Revenue Department, since one could not pay rates for a property he did not own.
18. DW1 testified that even though in this case the county government was yet to officially communicate to the petitioner and or offer a refund, still the received payments were no proof of land ownership. On the issue of the minutes DW 1 insisted the ones for 9.6.1965 were not authenticated by the relevant custodian, the county secretary DW1 also claimed that she had other minutes nullifying P. Exh No's. 2 and 3 though they were not produced before court. Regarding P. Exh No. 5 (a) & (b), DW 1 stated that though allegedly approved by the public health officer, the department of physical planning appeared to have recommended for a change of user to commercial use on 19.9.2013. She could not however ascertain or confirm what documents the petitioners had supplied before the approvals were made.



19. DW 1 further stated that the two offices which made the approvals could not confirm ownership but hastened to state that the alleged approvals were yet to be recalled and or revoked by the respondents or the two approving bodies.
20. Though an enforcement notice had been issued by the respondents, DW 1 could not confirm if any action had been taken against the petitioner for presenting the alleged approval plans based on an unauthenticated document of ownership. Further DW 1 admitted that the 2<sup>nd</sup> respondent took over the assets and liabilities of its predecessor together with decisions made so long as they had not been revoked.
21. DW 1 said that the deceased would not have made a 2<sup>nd</sup> request if the land had already been allocated in 1965. She nevertheless insisted that the deceased's application was deferred DW1 testified that D. Exh. No's (1) and (2) related to several markets and lacked a parcel number. However, DW 1 clarified that after 2013 all documents relating to plots reverted to the department of physical planning under the custody of the county secretary. In this case, DW 1 was emphatic that the application for 1998 was deferred but could not tell what else happened after the deferment. DW 1 said that D. Exh No. (2) referred to established markets and did not specifically refer to LR No. Kibirichia/Kibirichia/634. Her evidence was that the change of user alluded to in the petitioner's approved plans created an impression that it was referring to something else.
22. On the authentication of the minutes, DW 1 said that the physical planner should have been the one to certify the minutes and not the sub county administrator whose job description was on administrative duties only, but did not entail the certification of documents falling outside his docket.
23. Regarding P. Exh No. 7, DW 1 admitted that it was in reference to LR No. Kibirichia/Kibirichia. She could not confirm or deny if the petitioner was given a fair hearing before the enforcement notice was issued for him to avail any proof by way of ownership documents' DW 1 said that the respondents were in order to issue and proceed to enforce the notice since the petitioner did not possess any authentic ownership documents over the land.
24. Additionally, DW 1 said that she was not aware if the respondents possessed a court order to demolish the alleged illegal developments on the land. Moreover, DW 1 said she was not aware of any interventions between 1998 and 2015 regarding the alleged illegal construction on the land by the respondents including an action to recover the land with effect from 1967. DW 1 also stated that the enforcement notice was silent over the refund of the received rates and rent payments.
25. In re-examination, DW 1 insisted the suitland was public land and hence the residents of the area including their local leadership were justified to make a complaint in order for the respondents to act over the land reserved for public use as per D. Exh No. (1) which was within the powers of the 2<sup>nd</sup> respondent to execute.
26. At the conclusion of the evidence, parties were directed to and did file written submissions dated 18.10.2022 and 17.11.2022 respectively. The petitioner submitted that the petition is pleaded with precision and certainty hence met the threshold of a constitutional petition as per the caselaw of; Anarita Karimi Njeru vs Republic (1979) 1KLR 54, Mumo Matemu vs Trusted Society of Human Rights Alliance (2013) eKLR, Simon Natal Ntoitha vs Sub-county Land Adjudication and Settlement Officer, Igembe North and others (2022) eKLR.
27. On the merits of the petition, the petitioner submitted at paragraph 12 of the amended petition that he had demonstrated the threat as per the enforcement notice dated 23.9.2015 (P. Exh No. (7) to evict him from the suit land had he failed to appeal to the liaison committee or the High Court.



28. Since the liaison committee had not been established by the respondents, the petitioner submitted that he had no option but to move to court after replying to the notice as per P. Exh. No's (8) & (9) and after lodging ownership documents to the 1<sup>st</sup> respondent, who did not take any action. On the issue for determination the petitioner submitted that the court has to determine whether or not he was entitled to the reliefs sought since P. Exh No. (7) amounted to an unfair administrative action for he was lawfully and procedurally allocated land in the 1<sup>st</sup> instance going by P. Exh No's. (2) and (3). He relied on the case of Simon Natal Ntoitha (*supra*).
29. The petitioner submitted that the notice for eviction was illegal ab initio by dint of the *Land Act*. Reliance was placed on *Moi Educational Centre Co. Ltd vs William Musembi and 16 others* (2017) eKLR, Articles 48 and 50 (1) of *the Constitution* on the right to access justice and to be heard since the deceased and the family have been in occupation since 1965. It was submitted that the petitioner had also a legitimate interest on the land. Reliance is placed on *M'Munoru M'Mugwongo and 2 others vs County Government of Meru* (2020) eKLR.
30. On the breach of the right to acquire land, the petitioner submitted that the two minutes for the allocation remained unchallenged or unrevoked and though the land remained unalienated to him or his deceased father, nevertheless, his legitimate interest ought to be respected. Reliance was placed on *M'Mukanya vs M'Mbijiwe* (1984) eKLR, on the proposition that the receipt of rent estopped the 2<sup>nd</sup> respondent from denying the petitioner's interest.
31. On the corroboration of his evidence the petitioner submitted that PW 2 & PW 3 corroborated his evidence as well as the statement of Daniel M'Ikiao M'Rinyiru dated 7.6.2018 who passed on before testifying. Regarding the respondent's testimony, the petitioner submitted that it remained uncorroborated by any residents of Karanene market to the extent that the land was public in nature. Due to the change of goal posts, contradiction in the evidence of DW 1, failure to produce records as exhibits to support her evidence, glaring inconsistencies to D. Exh No. (2) on the description of the plot or land, the lack of evidence from the land registrar and above all, lack of a confirmation if the application for a plot was approved or deferred, the petitioner submitted that the defense testimony could not stand the test of law.
32. Additionally, the petitioner submitted that if at all the land belonged to the 2<sup>nd</sup> respondents, DW 1 was unable to explain what action it took between June 1965 to 23.9.2015 to reclaim the land or to stop the petitioner from developing it. On the reliefs sought, the petitioner submitted that based on the facts, evidence tendered and the law, the court should find merits in the amended petition and guided by the cited caselaw, to proceed to issue the reliefs sought with costs.
33. The respondents submitted that the issues for determination were: -What was the process of land allotment in law by the defunct county municipal council, and if the petitioner's late father met the above criteria.
34. On issue no. (1), the respondents submitted Sections 114 (1) (a) and 115 of the retired Constitution required the trust land to be registered in the name of the County Council as a freehold. Therefore, the respondents submitted that D. Exh. No. (1) was valid in law since the land was reserved for the public under the Karanene Canteen as per Article 62 (1) & (2) of *the Constitution*. On the disposal of such land, the respondents submitted that the same could only be done in line with the Government *Land Act* now repealed and replaced by Sections 3 & 105 of the *Land Registration Act*. Therefore, the respondents submitted that under Section 26 thereof, a title such as D. Exh No. (4) was conclusive evidence of ownership in absence of fraud, misrepresentation, illegality or corruption.



35. On the manner of allotment of public land, it was submitted that Sections 3 & 9 of Government Act (repealed) required a county council where the land was situated to recommend the availability of the land to the Commissioner of Lands so that the allotment could be ratified by the Commissioner of Lands, followed by the drawing and the approval of a part development plan, thereafter the Commissioner had to set the price, conditions in the lease, determine any special covenants and the annual rent payable. The fourth step as submitted by the respondents the would be gazettelement of the plots to be sold at least four weeks prior to the sale by auction, covering the details in step three above, followed by the public auction to the highest bidder; the issuance of the allotment letter to the successful allottee while awaiting the fulfilment of the conditions stipulated by the offeree.
36. The respondents submitted that the alleged allotment letter was not accompanied by a part development plan. Lastly it was submitted that the seventh step after the allottee complied with the set conditions required a cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate, which processes precipitated the issuance of land reference numbers and finally the issuance of a certificate of lease.
37. On issue no. (2), the respondents submitted that the petitioner's father did not meet the foregoing cited processes of land allotment by the then Meru County Council. That the land was never alienated from the county council as per D. Exh No. (1) and therefore remained government unalienated land in terms of Section 2 of the Government *Land Act* (repealed) and Section (3) of the Physical Planning Act (now repealed) which was never leased to any person. Reliance was placed on *Ali Mohamed Degane vs Hakar Abshir and 3 others* (2021) eKLR, *Kenya Anti-corruption Commission vs Lima Ltd and 2 others* (2019) eKLR. In sum the respondents urged the court to find the petition lacking merits.
38. The court has carefully gone through the party's respective pleadings, evidence tendered, written submissions and the law cited. The issues calling for the court's determination are:
- i. If the petition has met the constitutional threshold and disclosed any constitutional question(s).
  - ii. If the petitioner has proved any breach, threat or infringement of his constitutional rights and freedoms.
  - iii. If the petitioner exhausted any available alternative dispute resolution mechanisms and if not so, whether his dispute was exceptional in the circumstances.
  - iv. What reliefs is the petitioner entitled to
  - v. What is the order as to costs?
39. A party seeking constitutional reliefs on account of breach of his constitutional rights and freedoms is required to comply with Articles 22, 23 & 258 of *the Constitution* and *the Constitution* of Kenya (Fundamental Rights & Freedoms) Practice and Procedure Rules 2013, by describing and stating his capacity, address, particulars of the right or freedom infringed, threatened or breached, nature and particulars of loss, injury or damage, grounds for the claim, disclose pending or determined proceedings over the matter and lastly disclose the reliefs sought.
40. Prior to promulgation of the aforesaid Rules, the court in *Anarita K. Njeru vs Republic* (supra) and *Mumo Matemu vs Trusted Society* (supra) had held that a constitutional petition must be pleaded with specificity, precision, clarity and certainty so that the opposite parties can understand it and respond to it. Similarly, courts have held that a constitutional petition must be self-evident on the issues, alleged breaches, reliefs sought and evidence to be relied upon otherwise a party should not approach the court



- to be assisted to go and gather evidence in order to prosecute a petition lacking substratum or evidential material.
41. A constitutional petition must also raise constitutional questions or controversies. It must be over a constitutional right and or freedom but not based over alleged breach of statutory rights. What amounts to a constitutional controversy or questions has been subject to court interpretations in this county and beyond. In the case of *Senate vs Council of Governors and 6 others* Petition 24 and 27 of 2019 Consolidated (2022) KESC 57 (KLR) 7<sup>th</sup> October (2022) Judgment), the Supreme Court of Kenya held that the purpose of *the constitution* is inter alia to entrench good governance, the rule of law, accountability and transparency.
  42. A constitutional question is any issue that requires or revolves around the interpretation of *the Constitution* in order to resolve an issue rather than the interpretation of a statute. See *John Harun Mwau vs Peter Gastrol and 3 others* (2014). In *R (on the application of Miller vs The Prime Minister Cherry and others vs Advocate General for Scotland* (2019) UK SC 41 the issue before the Supreme Court United Kingdom was constitutional questions inter alia whether the Prime Minister's advice to the Queen was lawful and justifiable in the court of law and if so what standards of its lawfulness and if it was not, what remedy should the court grant. The court held that the advice given by the Prime Minister to prorogue parliament was offensive of *the Constitution*.
  43. In *CNM vs WMG* (2018) eKLR, the court cited with approval *Fredricks and others vs MEC for Education and Training Eastern & others* (2001) and *S vs Boesak* (2001) ISA 912 (CC); 2001 (1) BCLR 36 CC at paragraph 13 where it was held a constitutional matter must be gleaned from the reading of *the Constitution* itself and must include disputes as to whether any law or conduct was inconsistent with *the Constitution*, issues concerning the statutory powers and functions of an organ of the state, its interpretation, application and the upholding of *the Constitution*.
  44. In the case of *Gabriel Mutava & 2 others vs MD KPA & another* (2015) eKLR, the court underscored the fact that a constitutional litigation was not open for every claim which may properly be dealt under an alternative existing frame work for redress in civil or criminal law. Similarly, in the case of *Speaker of the National Assembly vs James Njenga Karume* (1992) KLR the court emphasized that where there was a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure must be strictly followed.
  45. Again, in the case of *Republic vs Paul Kihara Kairuki AG and 2 others Exparte LSK* (2020) eKLR, the court gave out examples of constitutional questions as including the constitutionality of an Act of Parliament, its interpretation and the application thereof.
  46. Applying the foregoing case law to the petition herein, the question is whether what is before this court can only find its answers or solutions through the reading, interpretation and the application of *the Constitution* and not through the interpretation of a statute.
  47. The bone of contention by the petitioner is that as an allottee, occupant and developer of the suit premises with the knowledge and acquiescence of the 2<sup>nd</sup> respondent, he was issued with an enforcement notice threatening him with an eviction, which in his considered view was in total violation to his right to access to justice, fair hearing, fair administrative action and the rights to ownership of land.
  48. Further, the petitioner pleaded that the only other recourse save for this court, was a liaison committee which the respondents had not constituted at the time the said notice was issued. Additionally, the petitioner averred that even after he made a response to the notice as requested, the respondents ignored



his explanation and failed to accord him fair hearing hence leaving him with no alternative than to seek audience of a constitutional court as a last resort for constitutional reprieve.

49. On the other hand, while admitting that the petitioner has been in occupation of the suit land for a long time, the respondents have termed the purported minutes of plot allocation and the continued developments thereon as null, void, illegal, unprocedural and unlawful since the suit land was, is and remains an unalienated public land in line with Article 62 of *the Constitution*. The 2<sup>nd</sup> respondent therefore urged the court to find that they were constitutionally and statutorily justified in issuing the enforcement notice and proceeding with the intended action to evict the petitioner from the suit premises in order to protect public land from intruders.
50. Looking at the dispute herein, what the court is being called upon is to interpret the action, conduct and the manner in which the respondents exercised their statutory powers, functions and or duties vis a vis the constitutional standard or spectrum in upholding, protecting and promoting the rights of the petitioner as expected of them under Articles 6, 2, 10, 20, 21, 40, 60, 62, 66, 186 & 189 of *the Constitution* as read together with Schedule IV of *the Constitution*.
51. In my view therefore, the question(s) raised by the petitioner and responded to by the respondents transcend beyond the statutory framework governing the respondents and calls for answers from this court sitting as a constitutional court.
52. Coming to the twin issues as to whether the petitioner has established any proprietary interests' rights or entitlements over the suit land in the first instance and secondly, if indeed there was a threatened breach or infringement of the said interests rights and entitlements ,the petitioner has pleaded that he entered, developed and continues to occupy the suit premises with the full knowledge, approval, acquiescence and the superintendence of the respondents through their predecessors in title.
53. In support of his assertions, the petitioner produced P. Exh Nos. 2, 3, 5, 6, 10, 11, 12 & 13 emanating from the respondents as well as P. Exh Nos. 1 & 2 showing that he has locus standi to bring the proceedings. In his testimony and during the cross examination of DW 1, the petitioner made it clear that since 1967 no eviction or vacation notice was ever served upon him until (2015) He testified that even after he filed and served the respondents with P. Exh Nos. 2, 3, 5, 6, 11, 12 & 13 before the court, no objection of their production was raised or a claim made for investigations on account of fraud, illegality, misrepresentation or forgery.
54. In response to this submission, the respondents have urged the court to find that even if the petitioner has been occupying the suit land on account of an intended allottee, there was no attempt of prove any compliance with the law, and the procedures, processes and the requirements of alienation of public land to individual beneficiaries. Therefore, the respondents urged the court to find that the suit land as per D. Exh No. (1) remained public land hence there was no violation of the petitioner's constitutional rights as alleged or at all.
55. In the case of Christian Juma Wabwire vs AG (2019) eKLR the court cited with approval Lt Col Peter Ngari Kagume and 7 others vs AG (2009) eKLR, where it was held that it was incumbent upon a petitioner to avail tangible evidence of the alleged violation of their rights and freedoms otherwise a court would not deal with speculations and imaginations ,but must be guided by evidence of probative value as provided under Sections 107, 108 and 109 of the *Evidence Act*.
56. In this petition, the petitioner relies on P. Exh No's. 2 & 3 as the basis for the allocation of the suit premises. Over and above the two exhibits the petitioner relies on the approved minutes produced as P. Exh Nos. 5 & 6 as well as the receipts for payment of land rates. P. Exh No's 11, 12 & 13 were paid and receipted during the pendency of this petition. The petitioner has produced no evidence of payment



of the statutory fees for approved development plans. There is no indication if the physical planner and the public health officers visited the locus in quo to oversee the developments and ensure compliance with the building code. Similarly, there was no evidence tendered to show that between 1965 and 2015, the petitioner made any attempt to pay land rates or rents and or attempted to regularize his possession and occupation of the suitland in terms of initiating the process of acquiring an allotment letter and subsequently obtaining a certificate of lease. See *Republic vs City Council of Nairobi & 3 others* (2014) eKLR. In absence of that evidence the right to land as alleged by the petitioner was yet to crystallize by the time the enforcement notice was issued.

57. In *Uwe Meixner and another vs AG* (2005) eKLR, the court held that the right forum to question the merits of any evidence is at a trial. The onus was on the petitioner to show what steps he had taken to regularize his ownership and possession of the suit property before the respondents came calling. In the case of *Jenifer Shamala vs LSK and 15 others* (2017) eKLR, the court held that the burden of proof throughout vests on the petitioner and the quality of evidence that is advanced must be considered with thoroughness and gravity as would be commensurate with the dire consequences that could follow thereafter.
58. In the case of *Flemish Investments Ltd vs Town Council of Mariakani* (2016) eKLR, the court held that by dint of Sections 117 (b) of the retired Constitution, once the plot was set apart for public purposes the rights of the any person prior or hitherto over the plot were extinguished by operation of [the Constitution](#) and any accrued rights by virtue of Section 23 of the Registered Titles Act were invalid since [the Constitution](#) was a higher legal norm than the statute.
59. In *Chemey investment Ltd vs AG & 2 others* (2018) eKLR, the respondents had repossessed an illegally acquired land without a court order. The court held that it could not give a seal of approval for self-help, highhanded tactics, or a violation of the law in order to right what was perceived to be wrong.
60. The petitioner herein urged this court that the minutes of land allocation were valid and enough to found that the said allocation was lawful and the land having ceased from being public land under Articles 62(1) (d) and 64 of [the Constitution](#). Unfortunately for the petitioner, this court is a court of law and not of sympathy. The court must follow the law and [the Constitution](#). The petitioner had the duty to follow and obey the law in 1965, 2010, 2015 and before this court.
61. Be that as it may, two wrongs cannot right a wrong. Even if the petitioner had no legal documents to the suit property, still the respondents were required in law to follow not only the statute on the repossession of illegally occupied public land but also the standards set under Articles 20, 22, 23, 40, 47 & 50 of [the Constitution](#). The enforcement notice falls short of the requirements of Sections 150A, B, C & D of the [Land Act](#). More importantly the parameters set under Article 47 (1) required the respondents to act lawfully, efficiently, reasonably, in a procedurally fair manner and to give written reasons for the actions.
62. In the case of *Gladys Shollei vs JSC* (2022) KLR the Supreme Court of Kenya pronounced itself on Articles 47, 48 & 50 of [the Constitution](#) as read together with the [Fair Administrative Action Act](#) on the basic constitutional minimums on the right to fair hearing and access to justice.
63. The respondents were constitutionally bound to give the petitioner fair hearing, access to justice and right to protection of the law as they purported to repossess public land. The law required the respondents to also involve the National Land Commission as per Sections 12 (8) and (9) of the [Land Act](#) and Section 33 of the [National Land Commission Act](#). Even though Section 38 of the Physical Planning Act (now repealed) allowed the respondents to issue an enforcement notice, this had to be subject to [the Constitution](#) since the [Land Act](#) had not come into operation at the time.



64. In *Mirugi Kariuki vs AG* (1992) eKLR, the court held that the mere fact that the exercise of discretion by the decision-making authority affects the legal rights or interests of some person, it makes it a quasi-judicial function and hence must adhere to rules of natural justice. Similarly, in *Dickson Ngigi vs Commissioner of Lands* (1998) eKLR, the court held that the right to fair hearing was a basic right. This was also restated in *Benson Milimo vs National Land Commission & 2 others* (2021) eKLR and *Adan Abdirahaman Hassan & 2 others* (supra). The respondents should have recognized the right to dignity of the petitioner. See *JW 1 vs Standard Group Ltd* (2013) eKLR, *Starose Ayuma & 2 others vs Registered Trustees of Kneya Railways Staff Retirement Benefits Scheme & 3 others* (2011) eKLR.
65. In the premises and based on the foregoing reasons I find the petition with merits and proceed to issue the following orders
1. A declaration be and is hereby issued that the respondents in issuing and purporting to enforce the notice dated 23.9.2015 violated the petitioner's right to fair hearing, access to justice and fair administrative action.
  2. A declaration is hereby issued that the said enforcement notice was invalid, illegal and unconstitutional
  3. A declaration is hereby issued that any revocation, repossession and eviction of the petitioner on an alleged public land must be undertaken in strict compliance with *the Constitution* and the statutory framework on public land repossession.
  4. There will be no order as to costs

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023**

**IN PRESENCE OF:**

**C/A: KANANU**

**KOECH FOR PETITIONER**

**MUTHOMI HOLDING BRIEF FOR E. KIMATHI FOR RESPONDENT**

**MR. E. KIMATHI**

**HON. C.K. NZILI**

**ELC JUDGE**

