



**Matetai v Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 2 others
(Petition E045 of 2020) [2023] KEELC 21363 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
PETITION E045 OF 2020
LC KOMINGOI, J
NOVEMBER 9, 2023**

BETWEEN

JUDY MATETAI PETITIONER

AND

**MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES &
COOPERATIVES 1ST RESPONDENT**

CHIEF LAND REGISTRAR, NAIROBI 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. By a Petition dated 4th November 2021, the Petitioner claims that she is the lawful registered owner of land referenced LR No.22383 having allotted to her on 17th May 1999 vide an allotment letter and a subsequent Certificate of Title issued on 4th September 2002. She has been in quiet possession and enjoyment since then until sometime in October 2021 when she was informed that the 1st Respondent was in the process of erecting a perimeter fence around the property which she claims was an act of trespass as espoused in Sections 3, 4, 5 and 12 of the *Trespass Act* and violation of her rights contrary to Article 29, 31 and 40 of *the Constitution*.
2. She seeks;
 - i. A declaration be and is hereby issued that the Land Reference No. 22383 situate in Nairobi City County belongs to the Petitioner as the legal and rightful owner.
 - ii. A declaration be and is hereby issued that the 1st Respondent's entry into Land Reference No. 22383 situate in Nairobi City County belonging to the Petitioner is unconstitutional, illegal and a violation of the law.



- iii. A declaration be and is hereby issued that the deprivation of the Petitioner's quiet enjoyment and use of her property is a contravention of her Constitutional rights.
 - iv. An order be issued restraining and/or prohibiting the Respondents jointly and severally from harassing, intimidating, and/or denying the Petitioner from dealing with the property known as Land Reference No. 22383 situated in Nairobi City County (the suit property).
 - v. An order of permanent injunction to restrain the 1st Respondent from trespassing onto the Petitioner's Land Reference No. 22383 situate in Nairobi City County.
 - vi. General damages for trespass against the 1st Respondent and fro restoring Land Reference No. 22383 situate in Nairobi City County to its original state before the trespass.
 - vii. Exemplary damages to remedy the oppressive, arbitrary and unconstitutional actions of the 1st Respondent.
 - viii. The costs of this Petition be borne by the Respondents.
3. The Petition is supported by the affidavit of Judy Matetai, the petitioner herein, sworn on the 4th November 2021 and a Supplementary Affidavit sworn on the 14th December 2021.
 4. In response to the petition the Respondents filed a cross petition dated 10th February 2022. The Respondents claim is that the parcel of land was alienated government land within Kabete area of the City of Nairobi and we was reserved for Ministry of Livestock department and Marketing as the beneficiary to be registered in the name of the Permanent Secretary Treasury as a trustee for the Ministry of Livestock Development for the Kabete Laboratory's Programmes.
 5. Further that, no part development plan for the suit land LR 189/R and LR 2952 where the suit land lies was or has been prepared and approved for alienation of the suit land to any private entity and or private user.
 6. That the proprietary interest/rights created in LR NO.22383 if any have been created contrary to *the constitution* of Kenya and in particular in breach article 40(3) and affords the 1st respondents no legal constitutional protection under Article 40(6) of *the constitution* of the Republic of Kenya.
 7. That the cross petitioners further contend that the acts of the 1st Respondents in obtaining, acquiring and getting registered as proprietor of land parcel Number LR NO 22383 are in total breach of Articles 62(4) of *the Constitution* which provide that public land shall not be disposed of a manner or otherwise except in terms of an Act of parliament specifying the nature and terms of the disposal.
 8. They seek the following Orders:
 - a. A declaration that the LR NO.22383 was obtained illegally, unlawfully and without following legal procedure and in violation of the physical planning regulations of the area and hence a nullity ab initio.
 - b. A declaration the title documents/leasehold interest created in LR NO.22383 is illegal and confers no proprietary interest to the respondents per the provisions of Article 40(6) of *the constitution*.
 - c. A declaration the allocation by the 2nd respondent of the suit land to the 1st respondents without following the statutory laws for the planned user is unlawful, illegal and unconstitutional.



- d. A declaration the letter of allotment for LR. NO.22383 be revoked together with any development thereon.
 - e. A declaration the title LR NO.22383 is a nullity ab ignition and the same is revoked and cancelled.
 - f. A declaration that the cabinet Secretary, Ministry of Agriculture Livestock and Fisheries is the lawful owner of the suit land LR 189/R.
 - g. That the 1st Respondents in the cross petition be condemned to bear the costs of this cross petition and the cost of the petition.
 - h. Any other appropriate relief this Honourable court may deem fit to grant.
- 8A. James Kamwere a licensed land surveyor filed a response competition dated 10th June 2022.
9. The Petitioner in a Supplementary Affidavit dated 14th December 2021 in response to the Respondents' Grounds of Opposition indicated that ELC No. 645 of 2013 (Nairobi) was distinct from the current suit because in that suit she had sued one James Charo (who was not party to this current suit) in his personal capacity and not as a Government employee. Thus, the two issues were separate and distinct from each other and should be addressed by merit. She also pointed out that despite the Conservatory orders given, the respondents had continued to trespass and erect a wall around the suit property.
 10. The Petitioner in her Response to the Cross Petition dated 10th June 2022 averred that the Respondents had neither dispelled her ownership of the suit property, proved their allegation that her Certificate of Title was acquired illegally or fraudulently nor challenged its validity. But were only sanitising their trespass by alleging that the suit property was public property. She pointed out that on 31st August 2012 the 1st Cross Petitioner / Respondent wrote to the Commissioner of Lands and indicated that it had no objection to the Petitioner's development because the suit property was outside Kabete Veterinary Services land. Therefore, the cross petition was unfounded/founded on their illegal acts of trespass.
 11. James Kamwere Muriuki a Licensed Land Surveyor in his response to the Cross Petition dated 10th June 2022 contested the claim that the survey and subdivision of LR No. 189R was irregular. He confirmed that his firm undertook survey and subdivision of land LR No. 189R and facilitated the issuance of Certificates of Title to individuals, companies as well as private and government institutions. The Petitioner's LR No. 22383 was among the parcels of land which were issued the Titles. He went on to state that had the survey and subdivision of LR No. 189R commissioned in 1995 and approved by the Commissioner of Lands in 1997 been irregular the Ministry of Livestock Development would not have issued him fresh instructions in 2010 to excise 2.8ha out LR No. 22380/26 which arose from the subdivision of LR No. 189R. And the National Land Commission would not have updated him in 2013 on the status of the Titles arising from other parcels of land from the subdivision of LR No. 189R.
 12. He added that the survey and subdivision was prepared and approved in 1997 before the enactment of the Physical Planning Act in 1998 therefore there was no requirement for a Part Development Plan at the time.
 13. She indicated that in 2012 she sought consent to develop the said property and the 1st Respondent stated that they had no objection to the development.
 14. The Respondents were directed to put in written submissions. By the time of writing this Judgement, the Respondents submissions had not been filed.



15. The petitioner upon being allocated the suit property was required to comply with the conditions; set out therein including payment of stand premium and ground rent with the prescribed period. In *Mbau Saw Mills Ltd Vs. Attorney General for and on behalf of the Commissioner of Lands*) & 2 others (2014) eKLR the Court stated;

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.”

Similarly in the case of *African Line Transport Co. Ltd Vs. The Hon. AG. Mombasa HCCC NO.276 OF 2013*, the Court stated thus;

“Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof. First, the allotment letter from the Commissioner of Lands; secondly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, with the specified timeline. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.”

16. I have had the opportunity of hearing the plaintiff testify in ELC 645 of 2013 *Judy Matetai Vs. James Charo*.

She explained how she acquired the said title;

- a. The Petitioner put out a request for quotation requiring one to carry out survey of land Reference Number 189R. The same was filed and submitted by One James Kamwere Muriuki and accepted by the 1st Respondent vide their letter dated 8th November 1995.
- b. The Petitioner and the Surveyor entered into a Contract Agreement dated 24th November 1995.
- c. The Petitioner, vide its letter dated 19th March 1997, informed the surveyor, James Kamwere Muriuki of the subdivision of Land Reference Number 189R and mandated him to pursue the Letters of Allotment issued by the Commissioner of Lands until the issuance of Title deeds.



- d. It is out of the survey and subdivision that the petitioner, who had applied to be allotted land, was issued with the Letter of Allotment dated 17th May 1999 upon payment of the upset price, the stand premium and ground rent.
 - e. Upon fulfilment of all the requirements, a Certificate of Title was issued to the Petitioner for a term of 99 years from 1st June 1999 making the Petitioners the proprietor and indefeasible owner of the suit property.
17. As stated in ELC 645 of 2013 once the petitioner was issued with a certificate of title. She became the absolute and indefeasible owner of the suit property.

In the case of David Peterson Kiengo & 2 Others Vs. Kariuki Thuo (2012) eKLR; the court stated thus;

“Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu’s fraud, their titles will be secure and guaranteed by the State. They were not obligated to ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the state for recovery of damages but not for possession or ownership of the property.”

18. Having held in ELC 645 of 2013 that the Petitioner acquired the title legally and procedurally I find that the Respondent’s prayer for cancellation and rectification of the register cannot issue as no fraud has been proved against the petitioner herein. Section 80 of the [Land Registration Act](#) provides;
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default. [Act No. 28 of 2016, s. 27.] 81.
19. I agree with the Petitioner’s submissions that there was no fraud in the acquisition of the title by the Petitioner or that she was involved in the alleged fraud.
20. The Petitioners’ case is grounded on the fact that she has an absolute and indefeasible title under the law that it is capable of being protected under Article 40 and that once a title was issued to her under the Registration of Titles Act, she therefore acquired an indefeasible title which cannot be taken away except in accordance with [the constitution](#) and the law. The issue of ownership was exhaustively dealt with in ELC 645 of 2013.
21. The issue in this case is whether the state, through the Respondents, can assert a right inconsistent with the title without following due process. The Respondents has pointed out that the property was illegally acquired even without any evidence to support the assertion and hence it is entitled to occupy the property. We urge this court not go give a seal of approval to the Respondents’ actions of violating the Petitioner’s right under Article 40 of [the Constitution](#).



22. The court in Evelyn College of Design Ltd Vs. Director of Children’s Department & another (2013) eKLR faulted the process used by State to take over property without following the due process.

“Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of *the Constitution*. First, it is implicit in Article 40(2) (a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40 (6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process. Third, Article 47(1) guarantees every person fair administrative action which includes due process.

I would once again emphasise that a finding of “unlawful acquisition” referred to in Article 40(6) of *the Constitution* must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the property. Thus, it was held in the case of Adan Abdirahani Hassan and 2 Others Vs. The Registrar of Titles and Others Nairobi Petition No.7 of 2021 (2013) eKLR that,

Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.”

In view of what I have stated, it is clear that even where property is said to be illegally acquired; it cannot be disposed without due process. Such dispossession cannot be effected by preventing the petitioner from enjoying the incidents of ownership of the land. Since the issue in this case concerns due process, I have exercised circumspection in commenting on the veracity or otherwise of the claims of illegal acquisition because, the State has the right to assert this position in the proper forum.”

23. Having stated so I find that the cross-petition cannot stand and the same is dismissed with no orders as to costs.
24. It is trite law that costs follow the event. I have considered the circumstances of this case and I do order each party do bear own costs.
25. In conclusion I find merit in the petition herein and I grant the orders sought namely;
- a. A declaration that the Land Reference Number 22383 situate in the city of Nairobi area belongs to the Petitioner as the legal and rightful owner.
 - b. A declaration that the 1st Respondent’s entry into Land Reference Number 22383 situate in the city of Nairobi area belonging to the Petitioner is unconstitutional, illegal and a violation of the law;
 - c. A declaration that the deprivation of the Petitioner’s quiet enjoyment and use of her property is a contravention of her Constitutional rights;
 - d. An Order of Prohibition be issued against 1st Respondent and/or any other servants, agents or representatives acting under them, prohibiting them from in any way harassing, intimidating



and denying the Petitioner from dealing with the property known as Land Reference Number 22383 situated in Nairobi area (the “suit property”).

e. An order of permanent injunction to restrain the 1st Respondent from trespassing onto the Petitioner’s land.

f. Each party do bear own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF NOVEMBER 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Wachira for the Petitioner.

Mr. Motari for the Respondents.

