



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CONST. PETITION NO. 13 OF 2020**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLES 2, 3, 10, 19(1) & (2), 20(1) & (2), 21, 22,**

**23, 258(1) & 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT**

**OF THE RIGHTS AND FREEDOMS IN ARTICLES 29, 40(1), 42, 43,**

**44, 47, 48 & 50(1) & (2), OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE**

**LAND REGISTRATION ACT, 2012**

**BETWEEN**

**BENEDICT MUKUMA KIMAU.....1<sup>ST</sup> PETITIONER**

**MUMBUA KIMAU.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**CHIEF LANDS REGISTRAR.....1<sup>ST</sup> RESPONDENT**

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

**MACHAKOS COUNTY LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. In the Petition dated 10<sup>th</sup> March, 2020, the Petitioners averred that they were offered a grant by the government for unsurveyed Residential Plot No. 443 Athi River (*the suit property*) measuring 0.40 Ha through a Letter of Allotment dated 24<sup>th</sup> February, 1995 and that by way of a letter dated 15<sup>th</sup> May, 1995, they accepted the grant and paid the requisite Kshs. 2,450 for Survey fees.
2. According to the Petitioners, the payment of Kshs. 2,450 was accepted by the government; that the Petitioners hired a private Surveyor who conducted a survey of the property and obtained a Beacon Certificate for the land and that they were informed that the title was being processed.
3. The Petitioners further averred that upon inquiry, they were informed that the suit property had been offered to another claimant and they applied to have a caution/caveat registered on the land.
4. The Petitioners averred that they have been treated in a discriminatory manner by failure to be issued with a title to the suit property; that they have on many occasions demanded for information on why the suit has not been registered in their names without success and that the Respondents have never officially communicated to them.
5. The Petitioners finally deponed that the failure by the Respondents to issue to the Petitioners with the title 25 years after accepting the offer undermines the Petitioners' right to fair administrative action and the right to own property. The Petitioners have prayed for the following orders:
  - a. *A declaration that the Respondents have violated the petitioners' fundamental rights and freedoms as protected under Articles 27, 28, 35, 40 & 47 of the Constitution.*
  - b. *A declaration that the Petitioners be compensated the amount of money that this Honourable Court deems sufficient and/or appropriate by the Respondents for the violation of the Petitioners' rights and fundamental freedoms under Articles 27, 28, 35, 40 & 47 of the Constitution.*
  - c. *This Honourable Court be pleased and do hereby grant Judicial Review order of mandamus to remove into this Honourable Court and compel the Respondents to register and issue the Petitioners with a Title Deed in respect of Uns. Residential Plot No. 443 Athi River.*
  - d. *Any other or further relief that this Honourable Court may deem fit to grant.*
  - e. *The costs of this Petition be provided for.*
6. Although the Respondents were duly served with the Petition, they neither entered appearance nor filed a response to the Petition. The Petition proceeded for hearing by way of written submissions.
7. In his submissions, the Petitioners' advocate submitted that Article 23(3) of the Constitution empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 of the Constitution and that the Respondents are public bodies charged to perform specific functions under the statutes.
8. The Petitioners' advocates submitted that the Petitioners have complied with all the conditions for issuance of the title to the suit property; that the Respondents have refused, failed and/or neglected to issue them with the title without any justifiable ground and that the Petition should be allowed. Counsel relied on numerous authorities which I have considered.
9. Annexed on the Petition is a copy of the Letter of Allotment which was issued to the Petitioners on 24<sup>th</sup> February, 1995. In the Letter of Allotment, the Petitioners were required to pay to the government Kshs. 25,337 for the unsurveyed residential plot number 443 Athi River, measuring approximately 0.40 Hectares.
10. The Petitioners have also annexed on the Petition a copy of the cheque in favour of the Commissioner of Lands for Kshs. 22,887 together with a receipt that was issued for the said amount dated 23<sup>rd</sup> May, 1995.
11. The evidence before me shows that after paying for the amount of money demanded in the Letter of Allotment, the Petitioners engaged a licensed Surveyor who surveyed the suit property and submitted the survey report to the Director of Surveys on 10<sup>th</sup> April, 2006. The Surveyor Report was duly registered by the Director of Surveys as Survey Plan Number F/R No. 456/102.
12. Despite being informed that the title in respect of the suit property was being processed under File Reference F202062 and F146876/B, the 1<sup>st</sup> Respondent has never issued to the Petitioners with the title.
13. Indeed, the Respondents have not proffered any reason why since the land was allocated to the Petitioners in 1995, and the said land surveyed in the year 2006, they have never issued the Petitioners with a title document.
14. Having been issued with a Letter of Allotment, and having met the conditions in the Letter of Allotment, the Petitioners had a legitimate expectation to be issued with a title document. In the case of ***Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others (2015) eKLR***, the Court of Appeal held that an allotment of an interest in land is a transaction in rem attaching and running with a specific parcel of land.

15. To the extent that the Respondents have not disputed the Petitioners' averments, and in the absence of evidence that the suit property was allocated to another person prior to the allocation of the same to the Petitioners, or that the suit property has since been registered in favour of a third party, it is my finding that the Petitioners have proved their case on a balance of probabilities.

16. For those reasons, I allow the Petition dated 10<sup>th</sup> March, 2020 as follows:

*a. A declaration is hereby issued that the Respondents have violated the Petitioners' fundamental rights and freedoms as protected under Articles 27, 28, 35, 40 and 47 of the Constitution.*

*b. A Judicial Review order of mandamus is hereby issued to remove into this Honourable Court and compel the Respondents to register and issue the Petitioners with a Title Deed in respect of Uns. Residential Plot No 443 Athi River.*

*c. Costs of the Petition to be paid by the 1<sup>st</sup> Respondent.*

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 28<sup>TH</sup> DAY OF MAY, 2021.**

**O. A. ANGOTE**

**JUDGE**