Muthaiga North Residents Association v Nyari House Limited; National Land Commission & another (Interested Parties) (Environment & Land Petition 115 of 2015) [2022] KEELC 2578 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2578 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 115 OF 2015

MD MWANGI, J

JULY 12, 2022

BETWEEN

MUTHAIGA NORTH RESIDENTS ASSOCIATION ..... PETITIONER

AND

NYARI HOUSE LIMITED ..... RESPONDENT

AND

THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... INTERESTED PARTY

Lacuna in the protection of wetlands in Kenya especially the ungazetted wetlands within public land

The petitioner's case was that the suit premises was public land and was not available for re-allocation and or appropriation for private use. Further, that the suit premises was a wetland. The court held that public land was held in trust for the people of Kenya and that land reserved for public utility was not available for further alienation. The court pointed out that section 3 of the repealed Government Lands Act reserved the right to allocate un-alienated Government land to the President. The court further noted a glaring legal lacuna in the protection of wetlands in Kenya, especially so, the ungazetted wetlands within public land and held that the laws needed to be harmonized to facilitate their seamless enforcement in order to conserve the endangered wetlands and other environmental resources in Kenya.

Reported by Kakai Toili

Land Law *- public land - alienation of public land - alienation of public land reserved for public utility - whether public land reserved for public utility was available for further alienation - whether the Commissioner of Lands had the authority to alienate unalienated Government Land - Government Land Act, Cap 280, (repealed) section 3; Land Registration Act, 2012, section 26.*

Constitutional Law *- locus standi - locus standi in environmental matters - what was the nature of locus standi in environmental matters - Constitution of Kenya, 2010, articles 22, 70 and 258.*

Environmental Law *- wetlands - nature of wetlands - what was the nature of wetlands.*

Environmental Law *- National Environmental Management Authority (NEMA) - mandate of NEMA - issuance of environmental impact assessment licences - what was the process to be followed by NEMA before issuing licences - Constitution of Kenya, 2010, article 10.*

Brief facts

The petitioner's case was that the suit premises was public land and was not available for re-allocation and or appropriation for private use. Further, that the suit premises was a wetland. It was stated that the circumstances under which the suit premises became public land were that one of the courts in Muthaiga North Estate was initially owned by the respondent who then caused the subdivision of the land into residential plots. The plots were disposed off by way of sale to third party purchasers who built their homes on their respective plots.

One of the conditions for the sub-division undertaken by the respondent was that it was to provide and apportion a part of the land for public amenities and use. That was done by way of surrender of the designated portion of land to the Government. The petitioner averred that the respondent indeed surrendered the suit premises and upon surrender, it was the petitioner's position that, that parcel of land then became public land. The petitioner's complaint was that the respondent had unlawfully re-acquired the suit premises purportedly by way of an allocation from the Commissioner of Lands.

The petitioner sought for among others a declaration that the suit premises was public land for purposes of article 162 of the Constitution of Kenya, 2010 (Constitution) and an order of *mandamus* directing the 1st interested party, the National Land Commission (NLC) to cancel the grant registered.

Issues

i. What was the nature of *locus standi* in environmental matters?
ii. Whether public land reserved for public utility was available for further alienation?
iii. Whether the Commissioner of Lands had the authority to alienate unalienated Government Land.
iv. What was the nature of wetlands?
v. What was the process to be followed by the National Environmental Management Authority before issuing licences?

Held

1. *Locus standi* was the right to bring an action before a court of law or another adjudicatory forum. The landscape of *locus standi* had been fundamentally transformed by the enactment of the Constitution by the people themselves.
2. In enforcement of environmental rights in Kenya, article 70 of the Constitution was emphatic that an applicant did not have to demonstrate that he/she or any other person had incurred loss or suffered injury. Any person could institute proceedings under article 70. The petitioner had the *locus standi* to institute the petition whether on its own behalf or on behalf of its members. In fact, any other person who was not even a member or resident of Muthaiga North Estate could as well have filed the petition. The petitioner was not a busy body.
3. According to the evidence before the court, the suit premises was surrendered to the Government on November 2, 2006. The law governing Government land in the year 2006 was the repealed Government Land Act (GLA). The respondent made the application for allocation of the suit premises in the year 2010. Public land was held in trust for the people of Kenya. Land reserved for public utility was not available for further alienation.
4. The respondent was allocated the suit premises by the Commissioner of Lands. Section 3 of the GLA reserved the right to allocate un-alienated Government land to the President of the Republic of Kenya. Even presuming that the suit premises was un-alienated Government land, it was only the President

who could alienate it. The power of the President under section 3 was delegated to the Commissioner of Lands in cases, only for religious, charitable education or sports purposes.

5. The Commissioner of Lands had no authority to alienate the suit premises to the respondent. The allocation of the suit premises to the respondent was therefore not only irregular but unlawful as well. Sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense. The court would not hesitate to cancel the respondent's title and revoke the grant issued thereof. Section 26 of the Land Registration Act was clear that a title obtained by illegal/irregular means could be cancelled. That would be so in the instant case.
6. The Land Use and Physical Planning Act made provisions for open spaces in land planning. Kenyans should take pride in having open green spaces within the estates. An open space was not a waste land. The avarice for public land and open spaces in Kenya had to come to end.
7. Under the Environment Management and Co-ordination Act (EMCA) and the Regulations made thereunder, wetlands meant areas permanently or seasonally flooded by water where plants and animals had become adapted; and included swamps, areas of marsh, peat land, mountain bogs, bank of rivers, vegetation, areas of impeded drainage or brackish, salt or alkaline; including areas of marine water the depth of which at low tide did not exceed 6 maters. It also incorporated riparian and coastal zones adjacent to the wetlands.
8. The Ramsar Convention on Wetlands to which Kenya was a state party defined wetlands as areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that was static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide did not exceed six metres. Article 4 of the Convention enjoined each state party (contracting party) to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they were included in the list of wetlands of international importance or not, and provided adequately for their wardening.
9. The Nairobi County Director of the 2nd interested party; the National Environmental Management Authority (NEMA) merely told the court that they had identified the suit premises as a wetland. They had not taken any other action to preserve the same not even pegging to demarcate the boundaries of the wetland. NEMA as one of the concerned authorities had to be pro-active in executing the mandate under the EMCA and the Ramsar Convention to protect wetlands. NEMA should never lose sight of the fact that it was bound by the public trust doctrine to preserve those environmental resources on behalf of the people of Kenya.
10. The evidence adduced by the petitioner and the 2nd defendant was not sufficient to enable the court make a conclusive finding that the suit premises was a wetland. The petitioner's prayer for an order restraining NEMA from issuing a license to the respondent to proceed with the proposed project and further from undertaking any process including public hearings and meetings relating thereto was too presumptive.
11. NEMA was empowered under statute to issue the kind of licence sought by the respondent. Before issuing the licence, NEMA was obligated to conduct public hearings and consult all stakeholders otherwise undertake the process referred to as public participation. Public participation was entrenched under article 10 of the Constitution. It was indeed one of the national values and principles of governance.
12. NEMA had a duty to hold public hearings before making a decision whether to issue the licence or not. NEMA was in the process of conducting public hearings and had not made a decision or given any indication that it was about to issue a licence to the respondent. That was why the prayer by the petitioner was presumptive. The court would therefore not issue the order sought against NEMA.
13. **[*Obiter*]"**There seems, however to be a glaring legal *lacuna* in the protection of wetlands in Kenya, especially so, the ungazetted wetlands within public land. Exactly whose mandate is it to protect those wetlands since public land is vested in County Governments and the National Government? The laws

need to be harmonized to facilitate their seamless enforcement in order to conserve the endangered wetlands and other environmental resources in Kenya."

Petition allowed.

Orders

i. *A declaration was made that the suit premises was public land for purposes of article 162 of the Constitution.*

ii. *An order of mandamus was made directing the NLC to cancel and or revoke the grant registered for the parcel of land.*

iii. *An order was issued restraining the respondent permanently from entering into, constructing upon or in any other way interfering with the suit premises.*

iv. *Respondent to pay the costs of the petition to the petitioner*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR 154; (1976 – 1980) I KLR 1272 - (Mentioned)
2. *Chemey Investment Ltd v Attorney General & 2 others* Civil Appeal 349 of 2012; [2018] eKLR - (Mentioned)
3. *Juletabi African Adventure Limited & another v Christopher Michael Lockley* Civil Appeal 75 of 2016; [2017] KECA 118 (KLR) - (Mentioned)
4. *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* Civil Appeal 327 of 2014; [2017] KECA 465 (KLR) - (Mentioned)
5. *Kipsirgoi Investments Ltd v Kenya Anti-Corruption Commission* Civil Appeal (Application) 288 of 2010; [2011] KECA 326 (KLR) - (Mentioned)
6. *Matemu , Mumo v Trusted Society of Human Rights Alliance & 3 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
7. *Ngimu Farm Limited v Attorney General* Environment & Land Case 373 of 2017; [2019] KEELC 1099 (KLR) - (Mentioned)
8. *Njau v City Council of Nairobi* [1983] KLR 625 - (Mentioned)
9. *Noor, Ahmed Mohammed v Abdi Aziz Osman* Civil Appeal 156 of 2018 ; [2019] eKLR - (Mentioned)
10. *Nyaga , James Joram & Another v Attorney General* 1732 of 2004; [2007] KEHC 3206 (KLR) - (Explained)
11. *Okoiti, Okiya Omtatah v Communication Authority of Kenya & 8 others* Constitutional Petition 53 of 2017; [2018] KEHC 7513 (KLR) - (Mentioned)
12. *Rajoru, Dorice Atieno & 145 others v Mjahid Suo-Chairman Harambee Maweni Committee Self Help Group & 2 others* Civil Case 63 of 2011; [2016] KEELC 554 (KLR) - (Explained)
13. *Republic v Commissioner of Lands & 4 others ex parte Associated Steel Limited* Miscellaneous Civil Suit 273 of 2007; [2014] KEHC 2498 (KLR) - (Explained)

Texts

Jowitt, WA., et al (Eds) (1977), *Jowitt's Dictionary of English Law* London: Sweet & Maxwell

Statutes

Kenya

1. Constitution of Kenya articles 1, 1A, 3(1); 10; 22, (2); 42; 47; 69 (i)(g)(h),(2); 70; 162; 258 - (Interpreted)
2. Environment Management and Co-ordination Act, 1999 (Act No 8 of 1999) sections 41(1)(a); 58 - (Interpreted)
3. Government Land Act (cap 280 Repealed) sections 2, 3 - (Interpreted)
4. Land Act, 2012 (Act No 6 of 2012) sections 9, 12 - (Interpreted)

5. Land Registration Act, 2012 (Act No 3 of 2012) section 26 - (Interpreted)
6. Physical Planning Act, 2019 (Act No 13 of 2019) section 3 - (Interpreted)
7. Societies Act (cap 108) In general - (Cited)

Instruments

Ramsar Convention on Wetlands, 1971 article 4

Advocates

Ms. Swaka h/b for Mr. C. Njenga for the Petitioner
Mr. T. Njenga for the Respondent

JUDGMENT

1. The petitioner in this matter, Muthaiga North Residents Association is a Residents' Association registered under the provisions of the *Societies Act*. It is an Association of Residents and Land Owners of Muthaiga North Estate, in Nairobi.

2. The petitioner seeks for orders that:-

    a) A declaration that the suit premises, LR 28181 Nairobi is Public Land for purposes of article 162 of the *Constitution*.

    b) An order of *mandamus* directing the 1st interested party to cancel the grant registered as IR 140342 for the parcel of Land LR 28181

    c) An order restraining the respondent permanently from entering into, constructing upon or in any other way interfering with the suit premises LR 28181.

    d) An order restraining the interested party from issuing a license to the respondent to proceed with the proposed project and further from undertaking any process including public hearings and meetings relating thereto.

    e) Costs of the suit.

3. The petitioner's case is that the suit premises, LR 28181 is Public Land for all intents and purposes and was not available for re-allocation and or appropriation for private use to the respondent or to any other person for that matter. Further that the suit premises is a Wetland.

4. The circumstances under which the suit premises became public land are that 'parkside court' which is one of the courts in Muthaiga North Estate was initially owned by the respondent. The respondent then caused the subdivision of the Land (comprising the Parkside court) into residential plots measuring approximately 0.2 hectares. The plots were disposed off by way of sale to 3rd party purchasers who have now built their homes on their respective plots.

5. One of the conditions for the sub-division undertaken by the respondent was that it was to provide and apportion a part of the Land for public amenities and use including play grounds, recreation, social amenities and other community initiatives for use by the residents of that court and the Muthaiga North Estate as whole. This was done by way of surrender of the designated portion of land to the Government of Kenya.

6. The petitioner avers that the respondent indeed surrendered the parcel of Land LR No 16217/3 measuring 0.7999 ha (suit premises). Upon surrender, it is the petitioner's position that, that parcel of land then became public land. The parcel of land is the suit premises, the subject matter of this petition.

7. The cause of the petitioner's complaint is that the respondent has, as the petitioner states at paragraph 16 of its petition, unlawfully, illegally re-acquired the Suit Premises purportedly by way of an allocation from the Commissioner of Lands. This is the same parcel of land that the respondent had initially surrendered to the Government of Kenya for purposes of public utilities. The parcel is now described as LR No 28181, Grant IR 140342 for a term of 99 years with effect from July 1, 1992.

8. The petitioner avers that the suit premises besides being public land is a Wetland as defined under the provisions of the *Environment Management & Co-ordination Act* (EMCA), as it is drained by various springs that traverse the general area of Muthaiga North Estate and serves as a natural habitat for various species of flora and fauna.

9. The petitioner further avers that the respondent has the intention of developing the suit premises by constructing a commercial undertaking. In pursuit of the intended purposes, the petitioner avers that the respondent has applied for a licence from the 2nd interested party (National Environment Management Authority - NEMA). The 2nd interested party has allegedly convened public hearings for purposes of receiving views from the public and residents of Muthaiga North Estate with the intention of issuing the respondent the Licence sought.

10. It is the petitioner's case that the respondent's actions constitute a violation of its constitutional rights as particularized in paragraph 20 of the petition. The petitioner has therefore brought the petition under the provisions of articles 3(1) and 70 of the *Constitution* of Kenya seeking the orders enumerated above.

11. The petition is supported by the affidavit of one Joseph Theuri, the chairman of Muthaiga North Residents Association. The deponent has exhibited a copy of the grant of the parcel of land LR No 16217/2 measuring 0.7981 ha, confirming the surrender to the Government of Kenya under entry 3. The surrender was registered on November 2, 2006.

12. Exhibit JT 4 is a copy of the grant registered in the Registry of titles as grant No 140342 for a term of 99 years with effect from 1/7/1992 described as LR No 28181 in the name of the respondent. Apparently the grant was registered on October 23, 2012.

Responses by the Respondent and the Interested Parties.

A. Reply by the 2nd Interested Party- National Environment Management Authority (NEMA)

13. The 2nd interested party's (NEMA) response was by way of a replying affidavit sworn on May 24, 2016 by Titus Simiyu, the County Director of Environment in charge of Nairobi County.

14. The deponent agreed with the averments in the petition by Muthaiga North Residents Association and the supporting affidavit thereof. He affirmed that NEMA had identified the suit premises as a Wetland. Following the identification of the suit premises as a Wetland under EMCA, it cannot be allocated for construction as proposed by the respondent as it would be in contravention of section 41(1)(a) of the Act as well as article 69(i)(g)(h) & (2) of the *Constitution of Kenya*, in promoting a clean and healthy environment.

15. Though the deponent confirmed that the respondent had applied for a licence after submitting an Environmental Impact Assessment (EIA) report, the licence can only issue after a successful EIA as per section 58 of*EMCA*. This would only have happened after the true owner of the land had been identified. In this case, the deponent stated that ownership of the suit premises is disputed.

B. Response by the 1st Interested Party.

16. The 1st interested party, the National Land Commission (NLC) filed a replying affidavit sworn by one Margaret Kiptuiya on April 18, 2015. The deponent was categorical that the suit premises is public land by way of a surrender, registration number 1396, No 380 entry 3 registered on November 2, 2006. The title in favour of the Government of Kenya still exists.

B. Response by the Respondent.

17. The respondent's reply to the petition was by way of a replying affidavit sworn by Mr Daniel Kamita Gichuhi on March 3, 2015. In the said affidavit, the deponent deposed that it only applied to be allocated the suit premises after it found out that it was not being utilized as intended and was actually wasting away.

18. The deponent further averred that the respondent was allocated the suit premises after due process therefore it was allocated procedurally and without any irregularities. The respondent avers that when it surrendered the suit premises, it surrendered its original title as well. Therefore, when it was re-allocated the said land, it was issued with a new title deed.

19. The respondent therefore affirms that it had the right being the lawful owner of the suit premises to develop it any way it deemed fit. It had actually applied for the appropriate licence from NEMA, after submitting an Environmental Impact Report.

20. The same deponent also swore another affidavit titled, 'respondent's affidavit in reply to the 1st interested party's replying affidavit' sworn on June 29, 2015. In the said affidavit, the deponent denied that the suit premises was public land and reaffirmed that it had already been allocated to the respondent - legally and in a proper manner. As far as the respondent was concerned, only its title was in existence.

21. The deponent further denied that the suit premises was a Wetland as alleged by the 1st interested party. According to the deponent, it is storm water that was accumulating on a half-filled pond within the suit premises that had previously been dug for purposes of irrigation. The determination by the 1st interested party was therefore erroneous.

Court's Directions on the Hearing of the Petition.

22. Parties in this matter agreed to rely on affidavit evidence contained in their respective affidavits, and the exhibits attached thereto, as their evidence before the court, without calling witnesses. The respondent however applied to cross-examine Mr Titus Simiyu, the deponent of the replying affidavit filed by the 2nd interested party.

23. The said Mr Titus Simiyu appeared in court on February 15, 2022. In cross-examination, the witness confirmed that NEMA protects Wetlands by gazetting them. In the instance of the suit premises, NEMA was yet to gazette it.

24. Further, the witness confirmed that there is a procedure followed by NEMA before gazetting a Wetland. The procedure had not been initiated with regard to the suit premises.

25. In respect to the submission of an EIA report, the witness opined that if a developer submits an EIA report to NEMA and does not received an answer within 3 months, where there is no court order, or any other valid inhibitions, he may proceed with the project. He confirmed that NEMA had not responded to the application by the respondent in this case because of the existing case and court order.

26. On re-examination, the witness stated that a Wetland is that land that is either permanently or temporarily occupied by water. It includes a swamp or even a riparian section. The witness stated that from his own observation, the suit premises is a Wetland since it fits the definition of a Wetland as part of it is covered by water. Further, the amount of water flowing from it made NEMA define it as a Wetland. He explained the process of declaring a Wetland to be a protected Wetland whose final step is the gazettement by the Cabinet Secretary in charge.

27. The witness stated that there are many Wetlands in Kenya that are not protected. Although developments may be allowed over Wetlands, it can only be with the approval of NEMA and in accordance with the law.

28. Upon the conclusion of the cross-examination of the witness, the court directed that parties to file written submissions. All the parties except the 1st interested party have complied and the court has had the opportunity to read the same.

Submissions by the parties.

A. Submissions by the Petitioner.

29. In its submissions, the petitioner identified 2 issues for determination namely: -

    i. Whether public land set aside for public use is available for re-allocation for private use

    ii. Whether the petitioner's constitutional rights have been violated.

30. In regard to the 1st issue, the petitioner submits that the suit premises is public land that was unlawfully appropriated for private use and registered in the name of the respondent. The petition has cited a number of decided cases to buttress its position, as follows; -

    i) *Republic –vs- Commissioner of Lands & 4 others & ex parte Associated Steel Mill* (2014) eKLR. In this case, the court upheld the doctrine of public trust. The court stated that where land is acquired for a public purpose, such land must be used for the purpose for which it was acquired and should not be allocated to private individuals for commercial purposes. The court categorically held that:

    > " It is thus our holding that the disputed plot having already been set aside as a public utility plot, the same was held in trust by the 1st respondent for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot."

    ii. *Kenya National Highway Authority –vs- Shalien Masood Mughal & 5 others* (2017) eKLR.

    In this case, the court was emphatic that public land and resources are held in trust for the needs of the society. Alienation of land that defeats the public interest goes against the letter and spirit of articles 1 & 1A of the *Constitution*.

31. On the 2nd issue, the petitioner submits that the respondent is acting in breach of article 42 of the onstitution since the suit premises is a Wetland as defined under EMCA. The respondent's intended development is an interference and destruction of the Environment and an infringement of the petitioner's constitutional rights under article 42.

32. The petitioner submitted that the 2nd interested party had also breached its rights under article 47 of the *Constitution* for fair administrative action. In this respect, the petitioner relied on the case of *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* (2018) eKLR. The gist of the holding

in this case is that article 47 entrenches the right to fair administrative action in the Bill of rights and bound all public officers and institutions in Kenya.

B. Submissions by the Respondent.

33. On its part, the respondent too identified 2 main issues namely: -

    i. Whether the suit premises is public land and a Wetland.

    ii. Whether the petitioner is entitled to the orders sought in the petition.

34. On the 1st issue, the respondent submitted that it only applied to be allocated the suit premises after it found out that it was not being utilized as intended and was actually wasting away. It is the respondent's submission that it was allocated the suit premises lawfully, procedurally and without any irregularities. The respondent avers that when it surrendered the suit premises, it surrendered its original title as well. Therefore, when it was re-allocated the said land, it was issued with a new title deed.

35. The respondent submits that the petitioner has not substantiated the allegations of irregularity and illegality against it as required by the law. The respondent cites the case of *Ahmed Mohammed Noor –vs- Abdi Aziz Osman* (2019) eKLR where the court held that where allegations of criminal or quasi-criminal nature are made, the standard of proof is 'proof beyond reasonable doubt'.

36. The respondent submits that, having acquired the suit premises lawfully, it has a right to develop it as it wishes. Its certificate of lease of the suit premises is conclusive evidence of its ownership under section 26 of the *Land Registration Act*. The respondent makes reference to sections 9 and 12 of the *Land Act* to buttress its argument that public land can be allocated to private individuals or entities, through the various ways listed thereunder.

37. The respondent submits that it intends to use the suit premises to develop a recreational facility which was indeed the intended purpose for it. The respondent reiterates that it followed all the necessary procedures before re-acquiring the suit premises.

38. The respondent further submitted that the petitioner had not proved the alleged particulars of breach of its constitutional rights. The petitioner cited the case of *Anarita Karimi Njeru v Republic* (1979) eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 3 others* (2013) eKLR cases to the effect that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the court ascertain whether or not a given right or a fundamental freedom has been infringed.

C. Submissions by the 2nd Interested Party (NEMA)

39. The 2nd interested party on its part identified 3 issues for determination namely:

    a. Whether the suit land has the status of public land;

    b. Whether the suit land is a wetland; and

    c. Whether the 2nd interested party has reasonably exercised its mandate throughout its contended operations relating to the suit land.

40. On the first issue, the 2nd interested party relied on the case of *Ngimu Farm Ltd –vs- Attorney General* (2019) eKLR where the court held that once land is surrendered, it is reinstated back to the grantee – the Government of Kenya.

41. The 2nd interested party made reference to the provisions of the *Land Act*, 2012, more specifically section 9 which provides that conversion of Land from Public to private requires the approval of both the National Assembly and the County Assembly.

42. I must however, point out that the allocation of the suit premises as confirmed from the exhibits presented before the court, happened before the *Land Act* 2012 came into force.

43. On the 2nd issue, the 2nd interested party submitted that the suit premises fell within the definition of a Wetland under EMCA, and should therefore be considered a Wetland for purposes of the petition before the court. It further submitted that the Wetlands Regulations, 2009 govern wetlands even in private Land, outlining the principles to be observed in order to protect them.

44. It was the 2nd interested party's further submission that whether gazetted or not Wetlands fall within the mandate, supervision and protection of NEMA.

45. Finally, on the exercise of its general mandate, the 2nd interested party submitted that it retains the mandate of general supervision and co-ordination over all matters relating to the environment and is the principal instrument in the implementation of all policies relating to the environment. The 2nd interested party's view was that issuance of the order sought by the petitioner against it would be tantamount to interfering with its mandate.

Issues for Determination

46. Having carefully perused the submissions filed by the parties herein, alongside the pleadings filed in this case, the issues for determination in this matter are:-

    a. Whether the petitioner has the locus standi to institute the petition herein.

    b. Whether the allocation of the suit premises to the respondent was lawful.

    c. Whether the grant issued to the respondent in respect of the Suit Premises should be revoked and or cancelled.

    d. Whether the suit premises is a Wetland in terms of the provisions of the Environment Management and Co-ordination Act and other applicable laws

Analysis and Determination

A. Whether the petitioner has the *locus standi* to institute the petition herein.

47. The petition in this matter was filed on February 6, 2015. This was about two and a half (2 ½) years after the promulgation of the *Kenya Constitution, 2010*.

48. 'Locus standi' is the right to bring an action before a court of law or another adjudicatory forum, for that matter. The Court of Appeal in the case of *Juletabi African Adventure Ltd & another v Christopher Michael Lackley* (2017) eKLR in defining Locus Standi referred to its earlier decision in *Alfred Njau & 5 others v City Council of Nairobi* (1983) eKLR.

49. In the said decision, the court held that, "the term *'locus standi'* means a right to appear in court and conversely, as is stated in *Jowitt's Dictionary of English Law*, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding...."

50. In deciding whether the petitioner has the *locus standi*, this court will make reference to the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, where the

court noted the historical transformation of constitutional litigation in this country in the following immortal words: -

> "It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the Constitution in 2010, by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some specific interest by or private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of articles 22 and 258 of the *Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to article 22(3), aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of June 28, 2013 (The Mutunga Rules) to *inter alia* facilitate the application of the right to standing. The rules reiterate any person other than a person whose right or fundamental freedom under the *Constitution* is allegedly denied, violated, infringed or threatened has a right of standing and can institute proceedings as envisaged under article 22(2) and 258 of the *Constitution*."

51. I need not add anything to this elaborate exposition on the issue of *locus standi*.

52. Additionally, I need to further point out that in enforcement of environmental rights in this country, article 70 of the *Constitution* is emphatic that an applicant does not have to demonstrate that he/she or any other person has incurred loss or suffered injury. Any person can institute proceedings under article 70.

53. The petitioner in this matter has the locus standi to institute the petition whether on its own behalf or on behalf of its members. In fact, any other person who is not even a member or resident of Muthaiga North Estate could as well have filed the petition. The petitioner is not a busy body as the respondent refers to it.

B. Whether the Re-allocation of the Suit Premises to the Respondent was lawful.

54. All parties in this matter are in agreement that when the respondent surrendered the suit premises then referred to as LR No 16217/13 to the Government of Kenya, it became Public land. No one disputed that. At paragraphs 9 and 10 of its replying affidavit, the respondent affirms that position. The respondent through the deponent, Daniel Kimata Gichuhi however, avers that the surrendered land became unalienated government land.

55. The dispute in this case is whether the re-allocation of the surrendered land to the respondent was lawful.

56. The respondent in its replying affidavit vehemently denies that the suit premises was allocated to it irregularly and or unlawfully. It states that it lawfully applied and was re-allocated the land by the Government of Kenya, for the unexpired term of 99 years from July 1, 1992.

57. The respondent justifies its position by stating that upon surrendering LR No 16217/2 to the Government of Kenya, the Land became unalienated Government land which the Government could allocate to any person or entity who could utilize it for its intended purpose. The respondent states that it intends to use the land for purposes of developing a recreational facility.

58. The respondent explains that before it was re-allocated the suit premises, it made known to the Government, the purpose for which it was seeking the re-allocation. The Commissioner of lands then invited the respondent for a meeting for purposes of organizing a site inspection exercise. After the

site inspection was conducted, the respondent wrote a follow up letter urging the expedition of the issuance of the title.

59. On its part, the petitioner alleges that the suit premises was not available for allocation and or appropriation as it was already reserved for public amenities. Hence the purported allocation was not only irregular but illegal.

60. I must restate that the fact of the surrender of the suit premises by the respondent to the Government of Kenya is not in dispute. From the evidence before the court, the suit premises was surrendered to the Government of Kenya on 2nd November 2006.

61. The law governing Government land in the year 2006 was the *Government Land Act* (GLA), now repealed. The respondent made the application for allocation of the suit premises in the year 2010 as evidenced by its two letters exhibited in its replying affidavit. DKG 3 dated October 28, 2010 and DKG 4 dated December 7, 2010

62. In determining whether the allocation of the suit premises to the respondent was Lawful or not, the court will make reliance on the provisions of the Government Land Act , the other statutes in force then and the numerous decided cases made over time on this issue.

63. As I had stated earlier, the petitioner's case is that the suit premises was reserved for public utilities purposes and was therefore not available for allocation and appropriation. The respondent evidently agrees that the suit premises was reserved for public utilities purposes but justifies its allocation on the basis that it intends to use the land for the very intended purposes.

64. Authorities are legion on the fact that Land reserved for public utility is not available for further alienation. Further that such land reserved for public utility is held in trust for people as was held in the case of *Dorcas Atieno Rajoru & 145 others v Mjahid Sub-chairman Harambee Maweni Committee SHG & 2 others* (2016) eKLR. The court stated that,

> "indeed it is trite law that plots for public utilities and open spaces are usually surrendered to either the council, the county government or the national government that is required to hold plots meant for public utilities on behalf of the residents of the place where such plots are situated."

65. The Court of Appeal in the case of *Kipsirgoi Investments Ltd v Kenya Anti- Corruption Commission* while interpreting section 2 of the GLA and section 3 of the *Physical Planning Act* held that allocation of the suit premises in that case which had been planned as an open space, was irregular as the land had already been alienated. The land was not available for further alienation.

63. The petitioner in its submissions cited a number of authorities in support of the above position.

66. In *Republic v Commissioner of Lands & 4 others ex parte Associated Steel Mill* (2014) eKLR, the court affirmed the position that public land must only be used for the purpose for which it was acquired and should not be allocated to private individuals for commercial purposes. The same position was upheld in *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* (2017) eKLR.

67. This court agrees with the position expressed in the 3 cases cited above amongst many others. This court adds its voice and declares that public land is held in trust for the people of Kenya. Land reserved for public utility is not available for further alienation.

68. In assessing whether the allocation to the respondent was lawful, this court will go further and ask the question, who actually allocated the respondent the Suit Premises?

69. I have carefully read through the replying affidavit filed by the respondent in this case. Apparently, the respondent was allocated the suit premises by the Commissioner of Lands. As I stated above, the applicable law at that time was the GLA section 3 of the GLA reserved the right to allocate un-alienated Government land to the President of the Republic of Kenya.

70. So even presuming that the suit premises was un-alienated government land, it is only the President who could have alienated it. The power of the President under section 3 of the GLA was delegated to the Commissioner of Lands in cases, only for religious, charitable education or sports purposes.

71. In the case of *James Joram Nyaga & another v Hon AG* (2007) eKLR, the court held that: -

> " The above section (section 3 of the GLA) clearly limits the power of the commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the president."

72. This court finds that the Commissioner of Lands had no authority to alienate the suit premises in this case to the respondent. The allocation of the suit premises to the respondent was therefore not only irregular but unlawful as well.

C. Whether the Grant Issued to the Respondent in Respect of the Suit Premises should be Revoked and all Cancelled.

73. The Court of Appeal in *Chemey Investment Ltd –vs- Attorney General & 2 others* (2018) eKLR categorically stated that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense. Having found that the suit premises was irregularly and unlawfully allocated to the respondent, it follows that the same should and must be revoked and or cancelled. This court will not hesitate to cancel the respondent's title and revoke the grant issued thereof. The law, section 26 of the *Land Registration Act* is clear that a title obtained by illegal/irregular means may be cancelled. This shall be so in this case.

74. I found it quite amusing when the respondent in its replying affidavit deposed that the suit premises had started going to waste and was not being utilized for the purposes which it was intended.

75. How, if I may ask was the land going to waste? Just because it had no concrete and mortar structure erected over it? The Land Use and *Physical Planning Act* make provisions for open spaces in land planning. We should take pride in having open green spaces within our estates. An open space is not a waste land. The avarice for public land and open spaces in this country must come to end.

76. My findings so far are enough to dispose of this matter. However, there was a 4th issue that I find befitting to make my finding on; whether the Suit Premises is a Wetland.

77. Under the EMCA and the regulations made thereunder, "Wetlands" means 'areas permanently or seasonally flooded by water where plants and animals have become adapted; and include swamps, areas of marsh, peat land, mountain bogs, bank of rivers, vegetation, areas of impeded drainage or brackish, salt or alkaline; including areas of marine water the depth of which at low tide does not exceed 6 maters. It also incorporates riparian and coastal zones adjacent to the wetlands.'

78. The Ramsar Convention on Wetlands to which Kenya is a state party, on the other hand defines Wetlands as 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres'.

79. Article 4 of the Convention enjoins each State party (Contracting Party) to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List of Wetlands of International Importance or not, and provide adequately for their wardening.

80. The Nairobi County Director of NEMA merely told the court that they had identified the Suit Premises as a Wetland. They had not taken any other action to preserve the same not even pegging to demarcate the boundaries of the 'Wetland'. NEMA as one of the concerned authority(s) must be pro-active in executing the mandate under the EMCA and the Ramsar Convention to protect Wetlands. NEMA must never lose sight of the fact that it is bound by the public trust doctrine to preserve those environmental resources on behalf of the people of Kenya.

81. There seems however to be a glaring legal lacuna in the protection of Wetlands in Kenya, especially so, the ungazetted Wetlands within public land. Exactly whose mandate is it to protect those Wetlands since public land is vested in County Governments and the National Government? The laws need to be harmonized to facilitate their seamless enforcement in order to conserve the endangered Wetlands and other environmental resources in Kenya.

82. From the foregoing, I don't find the evidence adduced by the Petitioner and the 2nd defendant sufficient to enable me make a conclusive finding that the suit premises is a Wetland.

83. The petitioner had sought an order restraining the 2nd interested party (NEMA) from issuing a license to the respondent to proceed with the proposed project and further from undertaking any process including public hearings and meetings relating thereto. I find this prayer too presumptive.

84. NEMA is empowered under Statute to issue the kind of licence sought by the respondent. Before issuing the licence, NEMA is obligated to conduct public hearings and consult all stakeholders otherwise undertake the process referred to as public participation. Public participation is now entrenched in our Constitution. It is indeed one of our national values and principles of governance under article 10 of the *Constitution*.

85. So, NEMA has a duty to hold public hearings before making a decision whether to issue the licence or not. In this case NEMA was in the process of conducting public hearings and had not made a decision or given any indication that it was about to issue a licence to the respondent. That is why I say that the prayer by the petitioner was presumptive. The court would therefore not issue the order sought against the 2nd interested party.

86. In conclusion therefore, the petitioner's petition is allowed in the following terms:-

    a. A declaration be and is hereby made that the suit premises, LR 28181 Nairobi is Public Land for purposes of article 162 of the *Constitution*.

    b. An order of *mandamus* be and is hereby made directing the 1st Interested party, the National Land Commission to cancel and or revoke the grant registered as IR 140342 for the parcel of Land LR 28181, Nairobi.

    c. An order be and is hereby issued restraining the respondent permanently from entering into, constructing upon or in any other way interfering with the Suit Premises LR 28181, Nairobi.

    d. The respondent shall pay the costs of the petition to the petitioner.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2022

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Swaka h/b for Mr. C. Njenga for the Petitioner

Mr. T. Njenga for the Respondent

N/A for the 1st and 2nd Interested Parties

Court Assistant: Hilda

M.D. MWANGI

JUDGE