



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC J.R NO. 7 OF 2018**

**(FORMERLY J.R NO. 72 OF 2010)**

**PETER NJOROGE MUIRURI & 9 OTHERS.....APPLICANTS**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**SAMUEL OJOWA ACHIENG.....1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. The Applicants filed the reference dated 7/9/2010 on 8/9/2010 in the Constitutional and Judicial Review Division of the High Court at Nairobi. They sought several interim injunctions pending hearing and determination of the reference which the court need not to consider. The Applicants seek a declaration that the alienation or allocation by the Respondents of land reference number (L.R. No.) 219/110 or any part of the land on which the Mathare Mabatini village stands to the 1<sup>st</sup> Interested Party or any other party to develop warehouses or any other commercial developments was in violation of the Applicants' right to adequate and accessible housing. They also seek a declaration that the alienation of the suit land to the 1<sup>st</sup> Interested Party was unlawful and violated the government's policy of upgrading informal settlements and ensuring access to adequate and accessible housing to residents of informal settlements including the Applicants.

2. Further, they seek a declaration that the suit land on which Mathare Mabatini village is situated is community land pursuant to Article 63 of the Constitution. They also sought a declaration that all the land on which Mathare Mabatini village is situated being government land which was allocated to the City Council of Nairobi and which the Applicants have been living on for over 40 years should be allocated to the Applicants and other residents on a communal basis based on their community of interests in priority to any other party. The Petitioners sought an order directing the 2<sup>nd</sup> Respondent to cancel the purported alienation or allocation of the suit land and all the other land on which the Mathare Mabatini Village is situated and allocation of the land to the residents on a communal basis.

3. The reference was made on the grounds that the Applicants and their families had been in occupation of the Mathare Mabatini informal settlement since the early 1970s and had built their houses on the land hence their entire lives and livelihoods were centred around that village. That the 2<sup>nd</sup> Respondent undertook not to allocate the land on which the village stood to individuals but instead requested the Applicants and other residents to join an ongoing slum upgrading initiative between the 2<sup>nd</sup> Respondent and a civil society organisation with a view to the land being allocated to them communally. In furtherance of that commitment, social services such water and sanitary facilities were put in place and the plans for upgrading of the Applicants' residences was drawn with the active participation of the 2<sup>nd</sup> Respondent's City Planning Department.

4. The Applicants stated that the 2<sup>nd</sup> Respondent purported to allocate the land on which the Applicants reside to individuals including the 1<sup>st</sup> Interested Party for the development of warehouses and jua kali sheds in total disregard of the Applicants' right to adequate and accessible housing and in breach of its undertaking to allocate the Applicants the land on a communal basis. The Applicants maintained that the purported allocation of the suit land to the 1<sup>st</sup> Interested Party or to any other individuals was unlawful. The 1<sup>st</sup> Interested Party commenced developments on the suit land and threatened to evict the Applicants. They urged that that would render them homeless in breach of their fundamental constitutional right to adequate and accessible housing. The Applicants urged the court to uphold and safeguard their constitutional right to adequate and accessible housing and the right to a livelihood since their entire lives were centred around the village and they had nowhere else to go if their rights were not protected.

5. Peter Njoroge Muiruri swore the affidavit in support of the reference. He deponed that he was a member of Muungano Mabatini Mwangaza Group, a community based organization comprising residents of Mathare Mabatini village. He attached a map for the Mabatini area and averred that members of his group had been living with their families and carrying out businesses on the land situated in Mathare Valley off Juja Road near the Chief's Camp. The village which is known as Mathare Mabatini borders Mathare Polytechnic and Mathare Special School.
6. He deponed that sometime in May 2010 it came to their notice that through its Director of City Planning, the 2<sup>nd</sup> Respondent had on 25/4/2010 approved development plans of one Samuel Ojowa Achieng c/o Simiyu B. Nakitare for the construction of a warehouse building and proposed workshop on L.R. No. 219/110. He attached a copy of the approval. He averred that L.R. No. 219/110 formed part of the land on which their village, Mathare Mabatini was situated and on which they had constructed their houses. He expressed concern that there were plans to allocate their entire village to individuals.
7. He deponed that on 27/2/2009 the 2<sup>nd</sup> Respondent's director of City Planning caused a notice to be published in the Kenya Gazette as Gazette No. 2043 regarding completion of a part development plan (pdp) for the proposed jua kali sheds in Mathare and that the pdp pertained to the land on which they had been living since the early 1970s. The Director invited representations or objections to the pdp and they lodged an objection dated 23/4/2009 pointing out that they had been in communication with the 2<sup>nd</sup> Respondent's office with a view to being allocated the land on which approximately 1000 people had been residing for almost four decades. The 2<sup>nd</sup> Respondent did not respond to the objection. The Applicants proceeded to construct public facilities and brought services such as water to the suit land with the approval of the 2<sup>nd</sup> Respondent.
8. The residents were extremely shocked when the 1<sup>st</sup> Interested Party deposited construction materials on the suit land in June 2012 and started construction of what appeared to be residential houses. He began to threaten the residents that they would need to vacate the suit land because the 2<sup>nd</sup> Respondent had allocated it to him. The residents wrote a letter to the Director of City Planning. He produced copies of the letters written by the residents seeking to be allocated the plot in Mathare Valley. He added that the 2<sup>nd</sup> Respondent expressly confirmed to the residents in writing that it had not allocated the land to anyone and that it would allocate the land to the residents on a communal basis. He referred to the letters dated 14/12/2007, 24/1/2008, 26/5/2008 and 19/8/2008 on the allocation of the land.
9. The residents believed that the 2<sup>nd</sup> Respondent was attempting to deprive them of their right to housing by purporting to allocate the land on which they had been living for several decades to individuals without considering their rights or interest. They believed that if the land were to be allocated then it should have been allocated to them.
10. Samuel Ojowa Achieng swore the replying affidavit in opposition to the reference. He deponed that he was the registered owner of the land known as plot number C on L.R. No. 219/110 measuring approximately 0.0813 ha within Mathare Area Nairobi. He claimed that he was allotted the land by the Nairobi City Council on 23/5/1996 and that he took possession of the land and was issued a beacon certificate. He claimed that he was given a site plan by the City Council showing the location of the suit land. He stated that he had been paying the necessary charges to the Nairobi City Council and that on 25/4/2010, the City Council approved his plans for the construction of warehouse class building – proposed workshop. He stated that he constructed the warehouse and that it was complete.
11. He stressed that he had completed building on his portion of land while the Applicants resided in their rooms adjoining his plot. He averred that he had no interest in the land occupied by the Applicants. He added that he and the Applicants had lived together peacefully for many years in their informal settlements until 28/6/2010 when the Applicants unlawfully and unreasonably interfered with his premises and wrote letters to the City Council to stop his construction. He was emphatic that he had never threatened to evict the Applicants from their dwellings nor would he ever threaten or evict them. He contended that he had been wrongfully joined in this proceedings because the Applicants did not occupy his small portion of land. He recommended that the Applicants should pursue the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to allocate them the land they resided on which bordered his small portion of land on which he had resided for many years.
12. The court file was transferred to the Environment and Land Court on 30/1/2018. The case was heard on 22/1/2019. Peter Njoroge Muiruri testified on behalf of the Applicants. He reiterated the averments in his supporting affidavit which was filed with the reference. He averred that when the 1<sup>st</sup> interested Party learned that the residents were challenging the allocation of their village, he went to the Chief Magistrate's Court at Milimani seeking to stop them from interfering with his land but the court made an order for the *status quo* to be maintained. He stated that the residents believed that if any allocation of the land were to be made, then it ought to be made to the residents and their families on a communal basis as part of the upgrading process which the 2<sup>nd</sup> Respondent had informed them that it intended to undertake in fulfilment of the Government's policy of ensuring access to adequate housing.
13. He stated that in several meetings held by the community and officials of the Ministry of Local Government, the Director of City Planning tacitly acknowledged that there was a problem with the allocation of the land on which the village stood and indicated that the pdp would be cancelled for the entire process to start afresh and to take into account their interest. He relied on the letter dated 2/7/2010 from the Assistant Secretary in the Ministry of Local Government addressed to the Town Clerk. He added that inquiries with the Commissioner of Lands confirmed that the land still belonged to the 2<sup>nd</sup> Respondent. He beseeched the court to intervene while mentioning that over the years persons employed by the 1<sup>st</sup> Interested Party had been harassing them and threatening to burn their houses if they did not vacate their houses and leave the land. He added that in total contempt of the court process, the 1<sup>st</sup> Interested Party continued to build on the suit land despite there being orders stopping him from further developing the land. He emphasised that the 1<sup>st</sup> Interested Party had not shown that he had a claim higher or greater than that of the Mathare Mabatini village community members and that he did not have a certificate of title to prove ownership of the suit land.
14. On cross examination, he stated that the suit land was allocated to them by the Chief and that they did not have letters of allotment because it was an informal settlement. He stated that the land where the Applicants lived measured approximately 0.41 hectares (ha). He had a structure on the land as did some of the Applicants. He stated that the 1<sup>st</sup> Interested Party's land was about 0.08 ha which was equivalent to five plots. He stated that some of the Applicants were pushed out of the suit land and that part of Mathare village was demolished. His

business was next to public toilets and he was a neighbour to the 1<sup>st</sup> Interested Party.

15. He stated that there were about 350 households with approximately 1000 people residing on the suit land. He clarified that the public toilet which is on the suit land was built by the Nairobi City Water and Sewerage Company in conjunction with Athi Water Board, Nairobi City Council, Pamoja Trust and the European Union. He stated that the toilet was constructed before they came to court and that the 1<sup>st</sup> Interested Party built on the land later.

16. He mentioned that there was a plan to upgrade the slums but that the structures which the 1<sup>st</sup> Interested Party put up stopped the upgrading program because the buildings had been planned for the whole village. The drawing designs were for the development of the whole land which according to him was public land and belonged to the Nairobi City Council. He maintained that the suit land was not properly allocated. According to him, the Chief would allocate land where there was space according to a person's needs. Mr. Muiruri stated that the 1<sup>st</sup> Interested Party was part of them when they were allocated space and that he was still a member of the village. He reiterated that the 1<sup>st</sup> Interested Party had taken up most of the village and relied on the plan showing the land had been subdivided into six portions marked A B C D E F.

17. Mr. Muiruri stated that he was in court on behalf of 350 households and that he represented the entire village called Mathare Mabatini. He insisted that there were no plots in the village and that it was an informal settlement. He gave the land registration number for the village as L.R. No. 219/14 and maintained that the suit land had never been demarcated.

18. Stephen Mwangi Chege also gave evidence for the Applicants. He stated that he had lived in Mabatini village from 1985. He explained that the Chief would show each person a place to settle on. He ran a hardware on the suit land and the 1<sup>st</sup> Interested Party had a garage. He lived in three rooms behind the hardware. The house he was living in was demolished and a small part of the hardware left. He was the 1<sup>st</sup> Interested Party's neighbour on the side of the public toilet which he explained was built before the 1<sup>st</sup> Interested Party's development. His house was demolished in 2010 when the 1<sup>st</sup> Interested Party commenced construction. He reported the matter to the leaders of the organisation and the chief.

19. Steve Gome gave evidence and produced the report on Mabatini Settlement which he was instructed to prepare by Pamoja Trust. The report contained the proposed upgrading of the informal settlement which was to occupy 1.1 acres. He stated that a proposal had been made for the informal settlement to be allocated the suit land whose title was held by the City Council of Nairobi in trust. The Attorney General and the City Council of Nairobi who were both sued as Respondents in the suit did not call any evidence.

20. The 1<sup>st</sup> Interested Party, Samuel Ojowa Achieng gave evidence. He stated that he went to Mathare in 1971 and was allocated the plot on which he resides by the Chief in 1984. He settled on the plot in August 1984 and constructed a garage on the plot. His garage developed and brought him substantial income. He stated that he applied to the City Council of Nairobi for allocation of the plot where he resided and where he carried on the business of motor vehicle garage repairs. He claimed that he was allocated the suit land by the City Council through the letter of allotment dated 23/5/1996. He maintained that he was the sole proprietor of the land known as plot number C at L.R. No. 219/110 measuring approximately 0.0813 hectares within Mathare area along Juja Road. That a beacon certificate dated 23/5/1996 signed by the City Council's Chief Land Surveyor was issued to him. He stated that the City Council prepared a site plan showing the location of the suit land.

21. He stated that he had paid to the City Council of Nairobi all the necessary charges including for approval of his building plans. That by a letter dated 25/4/2010, the City Council of Nairobi approved his plans for construction. He commenced construction. He stated that one building was complete while the second one was incomplete. He emphasised that his occupation of a small portion of the suit land did not disentitle the Applicants to their land. He stressed that he had never threatened to evict the Applicants from the land and urged that it was the Applicants who wrote letters to the City Council of Nairobi to have his construction stopped. He added that the Applicants trespassed on his land and constructed a public toilet.

22. He was categorical that he had been wrongly joined in these proceedings and urged that it was the duty of the State to provide reasonable housing for its citizens and not his duty. That as a Kenyan he was also entitled to provision of decent housing just like the Applicants and added that the quest by the Applicants for adequate housing from the State was limited to parcels of land within the control of the State but did not include private land that had been allocated to individuals like him. He stated that he was the sole proprietor of a separate and small parcel of land which was distinct and separate from the land occupied by the Applicants. He denied contravening any court order and urged that it was the Applicants who constructed a public toilet on part of his plot during the pendency of the court orders for the maintenance of the *status quo*. He claimed that he had documents to support ownership of his land.

23. The beacon certificate which Mr. Achieng relied on showed that it was for a plot in Mathare North, Juja Road. He did not have minutes prepared by the City Council of Nairobi for the allocation of the suit land. The City Council did not give him a lease. He paid Kshs. 17,000/= to the City Council on 31/5/1996 for plot C Mathare North off Juja Road. He denied that his land was in Mathare North which falls within Ruaraka Constituency unlike Mathare Mabatini which is in Mathare Constituency.

24. He conceded that the whole parcel of land was still in the name of the City Council and that the suit land had never been subdivided. His plot was measured by the City Council. He constructed a commercial and residential building on his plot which he claimed was built and completed before this case was filed. They stopped the second building when the court order was served on them.

25. He had not seen the replying affidavit sworn by Brian Ikol on behalf of the 2<sup>nd</sup> Interested Party in which he averred that there were no records in the lands office for L.R. No. 209/110. Mr. Ikol set out the procedure for allocation of land by the defunct City Council. He stated that he had built a 5 storey structure on the land and there was a second building near the water point. He maintained that he had not grabbed the suit land and that he did not remove the Applicants from the suit land. He obtained approvals to build from the City Council of Nairobi which owns all the suit land which he claimed allocated him that part of the land. He built where the surveyor showed him.

26. Parties filed submissions which the court considered. The Applicants submitted that they moved this court when the 1<sup>st</sup> Interested, who claimed to have been allocated by the 2<sup>nd</sup> Respondent part of the land where the Applicants and other residents of Mathare Mabatini Village reside, started constructing on the suit land and threatened to evict the Applicants and the other residents. The Applicants submitted that the suit land formed part of the land on which they had resided for many years since the 1970s and that they were in the process of upgrading it with the full knowledge of the 2<sup>nd</sup> Respondent. They stated that there were about 348 families and over 1000 people residing in that village.

27. The Applicants urged that the court had on two instances given orders in this case for the cessation of developments on the suit land and for the *status quo* to be maintained on the land but the 1<sup>st</sup> Interested Party continued the construction in disobedience of the court orders. They relied on the photographs taken in September 2010 showing the level of construction which the first building had reached back then and more photographs taken in 2015 showing the same building completed and another two which were under construction. The latter buildings were being erected on the land occupied by the Applicants' public toilet.

28. The Applicants emphasised that the suit land which is situated in Mathare Valley area off Juja Road near the Mathare Chief's camp, and which borders Mathare Polytechnic and Mathare Special School is public land. They relied on the averments in the affidavit of Brian Ikol, the Deputy Director Legal Affairs and Enforcement of the 2<sup>nd</sup> Interested Party sworn on 15/7/2016. Mr. Ikol deponed that L.R. No. 219/14 was allocated to the 2<sup>nd</sup> Respondent vide file number 555 and that the land remained public land because it had never been allocated.

29. The Applicants submitted that for over forty years they lived on the suit land in deplorable conditions without any infrastructure or amenities such as roads, water, sewer or toilets. They made reference to the correspondence exchanged with the 2<sup>nd</sup> Respondent in 2007 and 2008 regarding the Applicants' request to be allocated the land on which the village sits on a communal basis. That by the letter dated 26/5/2008, the 2<sup>nd</sup> Respondent advised the Applicants that it would allocate the land to them communally as part of the government's slum upgrading process.

30. The Applicants were advised to join the non-governmental organisation known as Pamoja Trust which was undertaking a slum upgrading program. The Applicants submitted that based on that advice, they commenced various activities on the land with the knowledge, consent and participation of the 2<sup>nd</sup> Respondent including the construction of a public toilet for use by the residents and installation of water kiosks on the suit land to supply clean water to the residents. They also commenced the survey of the land and prepared plans for the settlement with the consent and participation of the 2<sup>nd</sup> Respondent.

31. They submitted that when the 1<sup>st</sup> Interested Party claimed that he had been allocated the suit land by the 2<sup>nd</sup> Respondent, they sought clarification from the 2<sup>nd</sup> Respondent who denied that it had allocated the suit land. They relied on the 2<sup>nd</sup> Respondent's letter dated 9/9/2008 stating that any purported allocation of the land in question did not emanate from the 2<sup>nd</sup> Respondent's office. According to them, this confirmed that the suit land was still unalienated and was therefore government or public land.

32. The Applicants urged the court to uphold and safeguard their right to adequate and accessible housing as well as their right to a livelihood since their lives were centered on the suit land and they would have nowhere else to go if their rights were not protected. They joined the Attorney General to the proceedings so that he could advise the State on its obligations to its citizens. They joined the 2<sup>nd</sup> Respondent as the custodian of the public land on which they reside so that it can confirm that it did not allocate the suit land and for it to cancel the purported allocation to the 1<sup>st</sup> Interested Part or any other person and carry on the upgrade of the village.

33. The Applicants pointed out that despite not calling any witnesses to testify in the matter, the 2<sup>nd</sup> Respondent did not support the 1<sup>st</sup> Respondent's claim which meant that the purported allocation of the suit land to the 1<sup>st</sup> Interested Party was illegal, irregular and non-existent. They contended that a letter of allotment issued more than 25 years ago was not evidence of title. They pointed out that the beacon certificate which the 1<sup>st</sup> Interested Party relied on had discrepancies and referred to land known as plot C in Mathare North off Juja Road which was different from the suit land. They placed a lot of emphasis on the evidence the 1<sup>st</sup> Interested Party gave during cross examination on the contradictions on the exact location of the land which he claimed to have been allocated.

34. The Applicants maintained that they were being harassed and threatened by persons who they believed were agents of the 1<sup>st</sup> Interested Party. They were apprehensive that their houses would be burned down if they did not vacate the land. They submitted that some of them had been arrested by administration police officers which they believed was at the instigation of the 1<sup>st</sup> Interested Party so that they do not lay claim to the suit land. They urged that the 1<sup>st</sup> Interested Party did not have the protection of the law because he proceeded to develop the suit land based on approvals which he obtained illegally. That he had only himself to blame for the losses he may suffer because he put up developments on the suit land in the face of two restraining orders in contempt of the court orders.

35. The Applicants relied on the clarification given by the 2<sup>nd</sup> Interested Party on the documents which were necessary to support a regular allocation of public land. These included minutes of the committee on plot allocations, approved part development plans, evidence of payment of stand premium and a lease duly executed and registered at the lands office. They submitted that the 1<sup>st</sup> Interested Party had not produced these documents. They urged the court to uphold their public interest over the suit land.

36. The Applicants relied on Articles 22, 23, 40, 43 and 63 of the Constitution and urged that this court had jurisdiction to grant the orders they seek. They added that their right to safe and adequate housing was also recognised under international law. They relied on the National Housing Policy which was intended to arrest the deteriorating housing conditions and address the housing shortage in the country. They made reference to the objectives of the housing policy of facilitating the progressive realisation of the right to housing by all and facilitating access to land and security of tenure for all socio-economic groups.

37. The Applicants urged that the law was not followed in the purported allocation of the suit land to the 1<sup>st</sup> Interested Party and that the court should direct the 2<sup>nd</sup> Respondent to proceed with the upgrading of L.R. No. 219/14 where they reside in conformity with the

Government's Housing Policy. They concluded that directing that the land be allocated to them would ensure that they enjoy the right to safe and adequate housing. They urged that Pamoja Trust and the 2<sup>nd</sup> Respondent had jointly commenced upgrading initiatives on the suit land in a bid to turn slums built on public land into legal settlements and assist the residents to build decent living quarters.

38. The 1<sup>st</sup> Respondent submitted that an allotment letter was not proof of ownership and that the 1<sup>st</sup> Interested Party ought to have moved from the allocation to procuring a lease over the suit premises. The Attorney General pointed out that neither the Applicants nor the 1<sup>st</sup> Interested Party had proved ownership of the suit land. The 1<sup>st</sup> Respondent set out the procedure for registration of community land under the Community Land Act while contending that there was no cause of action against it. The Attorney General relied on what the Supreme Court had to say regarding community land under its Advisory Opinion No. 2 of 2014.

39. The 2<sup>nd</sup> Respondent submitted that this dispute was between the Applicants and the 1<sup>st</sup> Interested Party. It urged that the orders sought were not capable of legitimising the occupation by any party of the suit land against the backdrop of the Constitution and contended that the court ought to refer the matter to the parties to initiate the right processes to have their rights crystallise. It added that it was vested with power under the Constitution to allocate and bequeath land to a legitimate applicant where the right procedure was followed. However, that it informed the Applicants on 24/1/2008 that there was a government embargo on all plot allocations and that once the ban was lifted the Applicants' request would be acceded to. It submitted that the Applicants and the 1<sup>st</sup> Interested Party should re-engage the relevant authorities and apply for allocation of the land in accordance with the current laws. It argued that no plausible cause of action had been established against it and urged the court to dismiss the suit.

40. The 1<sup>st</sup> Interested Party submitted that the land in issue was L.R. No. 219/110 and not 219/14 as the 2<sup>nd</sup> Interested Party indicated in the affidavit of Brian Ikol. He contended that the suit lacked merit and that it should be dismissed with costs. He submitted that he was the sole proprietor of the suit land having acquired ownership of the land in 1996. He urged that as a Kenyan, he too had a right to own property in accordance with the Constitution. He relied on the letter of allotment and argued that he conducted due diligence before purchasing the land which confirmed that the land had no issues. He maintained that as a *bona fide* purchaser, he had the legitimate expectation that his interest in the suit land would be protected, and that he would enjoy all the benefits and privileges of proprietorship in accordance with the law.

41. The 1<sup>st</sup> Interested Party submitted that the Applicants illegally settled in Mathare Mabatini village for a long time and that they had not produced any evidence to prove the unlawfulness of his legitimately acquired property. He maintained that the Applicants did not have any proprietary interest in the suit land and that he should be allowed to enjoy his land which the 2<sup>nd</sup> Respondent allocated to him. He urged that he was issued a beacon certificate by the 2<sup>nd</sup> Interested Party's surveyor and relied on the site plan which he stated showed the location of the suit land. He further urged that the suit land was private land and not community land.

42. The 1<sup>st</sup> Interested Party also submitted that he was legally allocated L.R. No. 219/110 by the 2<sup>nd</sup> Interested Party who only mentioned L.R. No. 219/14 in its documents. He stated that he did not wish to be lumped with the Applicants who had no proprietary interest in the suit land. He urged that his right to property was protected by the Constitution. He denied that he had violated the Applicants' right to housing. He claimed that he had neither evicted anybody nor had he threatened to evict the Applicants from their land. He argued that the Applicants had not produced documents or witnesses to show that he had employed the persons who were harassing the Applicants and surmised that the claim was based on jealousy and malice towards him.

43. He argued that the Applicants made false claims that they were about to be evicted yet he only wished to enjoy quiet possession of the plot which the 2<sup>nd</sup> Interested Party allocated to him. He made reference to the case of **Kepha Omondi Onjuro** without supplying a copy of the decision to the court or giving the full citation for the case. Further, he submitted that he had worked very hard to develop the small plot which was legally allocated to him by the 2<sup>nd</sup> Respondent by constructing a warehouse on it based on the plans which the 2<sup>nd</sup> Respondent approved. He concluded that he was the proprietor of L.R. No. 209/110 on which he had resided for many years while the Applicants resided on the plot adjacent to his without any problems until he started constructing his building. He maintained that he was wrongly joined in these proceedings.

44. The main issues for determination in this suit are whether the Applicants proved that their right to adequate and accessible housing had been violated and whether the court should issue the orders sought in the reference.

45. It is not in dispute that the Applicants and the 1<sup>st</sup> Interested Party have lived on the suit land which is known as Mathare Mabatini village for over thirty five years. The 1<sup>st</sup> Interested Party confirmed in his evidence that he was allocated the plot on which he resides in Mathare Mabatini village by the Chief in 1984. The witnesses who were called by the Applicants also testified that it was the Chief who used to allocate plots to people in Mathare Mabatini village, which is an informal settlement. That is how the Applicants and the 1<sup>st</sup> Interested Party got to occupy the suit land.

46. The 1<sup>st</sup> Interested Party constructed a garage on the plot which the Chief had allocated him. His garage business thrived and brought him substantial income which made it possible for him to put up the multi-storeyed structure on the suit land. What emerges from the evidence which was tendered in court, is that once the 1<sup>st</sup> Interested Party's fortunes improved, he applied for allocation of part of the suit land so that he could develop a commercial building on the land. The developments which the 1<sup>st</sup> Interested Party carried out on the suit land certainly had an adverse impact on the lives of the other residents of Mathare Mabatini village, which remained an informal settlement. Mr. Muiruri testified that some of the Applicants were pushed out of the suit land and that part of Mathare Mabatini village was demolished when the 1<sup>st</sup> Interested Party claimed that he had been allocated land equivalent to five plots and commenced construction on the suit land.

47. The acrimony was exacerbated by the 1<sup>st</sup> Interested Party's construction on the land where the public toilet and water point are situated yet these common facilities serve the residents of Mathare Mabatini village, and were put up on the suit land with the knowledge of the 2<sup>nd</sup> Respondent, with the sole purpose of improving the livelihoods and the living standards of the residents of the informal settlement scheme.

48. The right of the Mathare Mabatini village residents to reasonable standards of sanitation enshrined in Article 43 of the Constitution deserves protection. In this court's view, the residents' rights to use and access the public toilet and water point on the suit land would rank in priority over the 1<sup>st</sup> Interested Party's claim to the suit land for commercial development. The 1<sup>st</sup> Interested Party could have purchased land elsewhere and developed it once his economic status changed. The rights of the other residents of Mathare Mabatini village to accessible and adequate housing on the suit land which is still public land also deserve recognition and protection until such time that the upgrading of the informal settlement is completed by the Government or other entities engaged in the upgrade.

49. The 1<sup>st</sup> Interested Party's claim that he was allocated plot number 219/110 by the 2<sup>nd</sup> Respondent was not corroborated by the 2<sup>nd</sup> Respondent. The evidence of Brian Ikol, an officer of the 2<sup>nd</sup> Interested Party was to the effect that there were no records at the lands office relating to L.R. No. 219/110 which the 1<sup>st</sup> Interested Party lays claim to. A letter of allotment would not confer title. The 1<sup>st</sup> Interested Party ought to have gone beyond the letter of allotment and obtained a title over the suit land if it were legally allocated to him by the 2<sup>nd</sup> Respondent. The court notes that the 2<sup>nd</sup> Respondent distanced itself from the purported allocation of the land to the 1<sup>st</sup> Interested Party in its letter dated 9/9/2008 in which it stated that any purported allocation of the land in question did not emanate from its office.

50. The 1<sup>st</sup> Interested Party failed to prove that the suit land was legally allocated to him under the Local Government Act which was the law applicable to land held by the defunct City Council of Nairobi. He is not the registered proprietor of the suit land as he claimed. The court doubts that the suit land which is public land and which is an informal settlement where the Mathare Mabatini residents comprising about 350 households with approximately 1000 people have occupied for almost forty years would have been available for allocation at a time when initiatives were being undertaken, with the knowledge and participation of the 2<sup>nd</sup> Respondent, for the upgrading of the Mathare Mabatini village with a view to improving the living standards of its residents.

51. The alienation or allocation of L.R. No. 219/110 or any part of the land on which Mathare Mabatini village stands by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Interested Party or any other party for purposes of putting up commercial developments was unlawful and violated the government policy of upgrading informal settlements and ensuring access to adequate and accessible housing to residents of informal settlements including the Applicants.

52. The 2<sup>nd</sup> Respondent is directed to cancel the allocation to any individual of the land on which Mathare Mabatini village stands or any part of it, and to allocate the land on which Mathare Mabatini Village stands to the residents of Mathare Mabatini village on a communal basis.

53. An order is issued restraining the Interested Party or his agents from harassing, evicting, or otherwise interfering with the Applicants' occupation and use of the land on which Mathare Mabatini village stands.

54. The Applicants are awarded the costs of the suit which will be borne by the 1<sup>st</sup> Interested Party.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. C. Keya holding brief for Ms. W. Ngugi for the Applicants

Ms. Ednah Makori for the 1<sup>st</sup> Respondent

Ms. L. Moraa holding brief for Ms. Z. Rashid for the 1<sup>st</sup> Interested Party

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Interested Party