



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**CONSTITUTIONAL PET NO.02 OF 2018**

**(formerly Machakos Constitutional Petition No.48 of 2013)**

**IN THE MATTER OF ARTICLES 21 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE  
27, 40, AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**BILLY KIKONDE.....PETITIONER**

**-VERSUS-**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF LAND**

**ADJUDICATION AND SETTLEMENT.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

- 1. N. MBAI**
- 2. A. KALOKI MUTINDA**
- 3. ESTHER N. WEKESA**
- 4. B. W. MWIIRI**
- 5. S. M. MAILU**
- 6. DANIEL MUSYIMI KIOKO**
- 7. J. MULAMA**
- 8. SAMMY KAKUU KIMEU**
- 9. STEPHEN MUTUA NGULI**
- 10. BOSCO MAUNDU MUTUA**
- 11. TOM MULWA MUTUA.....INTERESTED PARTIES**

## JUDGEMENT

1. By his petition dated 17<sup>th</sup> September, 2013 and filed in court on 28<sup>th</sup> September, 2013 the Petitioner prays for: -

**(a) A declaration that Plot No.184 Masongeleni Settlement Scheme was lawfully allocated to him and that he is the rightful owner of the said parcel of land.**

**(b) A declaration that any subsequent allocation of Plot No.184 Masongeleni Settlement Scheme to any other person especially the Interested Parties is null and void and that any title document issued to such person be cancelled.**

**(c) Costs of the Petition.**

2. The petition is supported by the supporting affidavit of Billy Kikonde, the Petitioner herein, sworn at Nairobi on the 16<sup>th</sup> September, 2013.

3. On the 21<sup>st</sup> July, 2016 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition dated 14<sup>th</sup> July, 2016. In the said grounds, the two Respondents have stated that: -

**1. THAT the Petitioner has not demonstrated before the Honourable Court how the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have violated his Constitutional Rights.**

**2. THAT the Directorate of Land is charged with the responsibility of ensuring efficient administration and sustainable management of the land resource in the country. Its mandate is to formulate and implement land policy, undertake physical planning, register land transactions.**

**3. THAT further the Directorate of Land is mandated to facilitate efficient land administration and management, access to adequate and affordable housing, social and physical infrastructure for national development.**

**4. THAT there is the establishment of the National Land Commission under Article 67 of the Constitution whose functions among others is to manage public land on behalf of the national and county governments and to recommend a national land policy to the national government.**

**5. THAT the National Land Commission is an independent office/Constitutional Commission.**

**6. THAT similarly the office of the Attorney General and Department of Justice has the mandate to promote, protect and uphold the rule of law and defend the public interest under Article 156 of the Constitution of Kenya.**

**7. THAT the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have always acted according to law in ensuring that the rule of law is upheld and public interest defended.**

**8. THAT there are no Constitutional issues raised for the Court to determine.**

**9. THAT the Petition does not raise any violation of the Petitioner's fundamental rights and freedoms by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

**10. THAT the petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.**

4. The 1<sup>st</sup> Respondent did not respond to the petition. Whereas the Petitioner filed a chamber summons application on 24<sup>th</sup> April, 2015 dated 22<sup>nd</sup> April, 2015 seeking for an order that service of petition and all other court processes upon the Interested Parties be done by substituted service by way of advertisement in a newspaper with nationwide circulation, there is no evidence of the Petitioner having prosecuted the said application. As it were, the Interested Parties remain unserved with the petition. Be that as it may, the Petitioner, the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents filed their respective submissions on the 09<sup>th</sup> and 21<sup>st</sup> October, 2016 respectively. This was pursuant to the Court's direction that the petition be disposed off by way of written submissions. The original court file soon thereafter appears to have gone missing forcing the Petitioner to file his Notice of Motion application to reconstruct this file from the photocopies of the pleadings and documents furnished by the Applicant. The Petitioner's application is dated 28<sup>th</sup> February, 2018 and was filed in court on 05<sup>th</sup> March, 2018.

5. The submissions by the Petitioner's Counsel are that the provisions of Articles 27, 40 and 47 of the Constitution 2010 are the legal basis of the petition. The three Articles guarantee equality and freedom from discrimination, protection of the right to own property and entitlement of every person to fair administrative action.

6. The Counsel went on to submit that in or about 1990, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allocated to the Petitioner a Settlement plot known as plot No.184 Masongeleni Settlement Scheme whereupon the Petitioner met all the conditions set out in the letter of offer where the requisite 10% deposit of the purchase price was paid to the Respondents. The Counsel pointed out that the Petitioner was finally allocated the plot pursuant to the Settlement Fund Trustees Regulations vide the letter dated 12<sup>th</sup> February, 1993. That when the Petitioner learnt that the said plot number 184 had been allocated to the Interested Parties, he lodged a complaint with the Respondents. The Counsel submitted that the Petitioner contends that the 2<sup>nd</sup> Respondent by unilaterally allocating the said plot No.184 Masongeleni Settlement Scheme to the Interested Parties without legal justification amounted to discrimination against the Petitioner who had fulfilled all the conditions for sale as set out in

the Letter of Allotment.

7. It was also submitted that from the facts of the petition, the 2<sup>nd</sup> Respondent did not accord any opportunity to the Petitioner to present his case before it arbitrarily and unilaterally proceeded to nullify the Petitioner's initial allocation of the said plot. That the actions of the Interested Parties to encroach into the said plot in May, 2001 by dint of the 2<sup>nd</sup> Respondent's actions infringed on the Petitioner's rights.

8. The Counsel went on to submit that the 1<sup>st</sup> Respondent being the successor in title to the 2<sup>nd</sup> Respondent in respect of settlement schemes, it assumed all the existing obligations, assets and liabilities and hence it is properly enjoined in these proceedings. The Counsel pointed out that the argument that the 1<sup>st</sup> Respondent is an independent office/constitutional commission cannot be interpreted to defeat the Petitioner's accrued rights and interest to the said plot. The Counsel went on to submit that the Petitioner's right to the suit property under Articles 40 and 47 of the Constitution cannot be taken away without due process being followed and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by depriving the Petitioner the use and utility of the suit property, they violated and/or infringed upon his constitutional rights.

9. The Counsel further submitted that the Petitioner has ably demonstrated and/or made out his case on specific infringement and/or violation of his rights under Articles 27, 40 and 47 of the Constitution and hence the grounds of opposition by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the petition are devoid of merit and ought to be dismissed with costs.

10. In support of this submissions, the Petitioner's Counsel cited the case of **Commissioner of Lands vs. Kunste Hold Ltd [1997] eKLR** where the Court of Appeal had this to say in relation to fair hearing: -

*"...In our case, Kunste Hotel Ltd. complains that the appellant decided to allot the subject plot to the interested party without giving it a hearing.... The issue we are concerned with here, and which is the crux of the matter in this appeal, is not whether Kunste Hotel Ltd has any right to the plot, but whether its interest in the subject plot was sufficient and, in the circumstances of this case so obvious that the appellant was obliged to consult or hear it prior to his decision to allot the plot to the interested party.*

*...The appellant was exercising his statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision.... It is, therefore, our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party."*

The Counsel further submitted that the Petitioner had legitimate expectation and/or entitlement to the suit property and he cited the case of **John Mbugua Gitau vs. Simon Parkoyiet Mokare & 6 Others [2014] eKLR** where the High Court held thus: -

*"The supreme court of India in the case of J.P.BANSAL –VS- state of Rajasthan & another civil Appeal 5982 of 2001 while applying and relying on the holding in Council of Civil Services Union case (Supra) stated thus:-*

*The basic principles in this branch relating to "legitimate expectation" were enunciated by Lord Diplock in Council of Civil Service Unions & others –vs- Minister for civil service (1985) AC 374 (408-409) commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted to continue to do until there has been communicated to him some rational grounds of withdrawing it on which he has been given an opportunity to comment, or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.... An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous."*

The Counsel further cited the case of **Vekariya Investments Ltd vs. Kenya Airports Authority & 2 others [2014]eKLR** where the High Court had this to say:-

*"...The right of KAA to the protection of its property cannot be wished away and it is in this context that I am called upon to determine whether there has been a threatened violation of the Petitioner's rights under Article 40 of the Constitution by the Respondents. The effect of the petition is to enforce the Petitioner's rights as against the rights of another title holder as a result of what is a double allocation. It is well established that where there is a double allocation, the first title in time takes priority. In *Gitwany Investment Limited vs. Tajmal Limited and 3 Others Nairobi HCCC No. 1114 of 2002 [2006] eKLR*, Lenaola J., observed that, " [46] My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. Commissioner of Lands, C.A No.71/1997 (unreported):-* is the "grant (that) takes priority. The land is alienated already." .....Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity." I agree with these sentiments and I find and hold that the title to the JKIA property takes precedence over the suit property."*

The Petitioner's Counsel concluded by urging the Court to allow the petition.

11. On the other hand, the Counsel for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents framed two (2) issues for determination. These were: -

**(1) Whether there are any constitutional violations?**

**(2) Whether the Petitioner was lawfully allocated land.**

12. On whether there are any constitutional violations the Counsel for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents submitted that the Petitioner failed to show the constitutional rights that were violated. The Counsel went on to submit that where a person is alleging contravention or threat of contravention of a constitutional right, he must set out the right infringed and particulars of such infringement or threat. In support of her proposition, the Counsel cited the case of **Annarita Karimi Njeru [1979]KLR 154**, and **[1979] KLR 162**.

13. Regarding the issue of whether or not the Petitioner was lawfully allocated the said parcel of land number 184 Masongaleni Settlement Scheme, the Counsel submitted that by definition Director of Land Adjudication and Settlement (emphasis are mine) has no power to allocate land or subdivide land in Kenya as his function is purely administrative in providing policy in order to facilitate the efficient land administration and management, access to adequate and affordable physical infrastructure. The Counsel went on to submit that the Constitution introduced the **National Land Commission (NLC) under Chapter 15, Article 248 (2) (b)** whose functions are to;

*(a) Hold title to public land in trust for use by the people of Kenya;*

*(b) Administer public land on behalf of the Government and local authorities.*

*(c) Define and keep constantly under review the National land policy.*

The Counsel correctly submitted that the NLC is the one mandated to manage public land on behalf of the National and County Governments.

14. It was also submitted that the Petitioner has not furnished the court with proof that he was allocated land parcel number 184 Masongaleni Settlement Scheme as he has stated in his affidavit. The Counsel was of the view that all what the Petitioner has done is to present to the court correspondence between him and the Ministry of Land which does not conclusively show that he was allocated the said land. The Counsel concluded by urging the court to strike out and/or dismiss the petition with costs as it is a waste of precious judicial time.

15. I have looked at the letter of offer in respect of plot No.184 Masongaleni Settlement Scheme marked as A1 in paragraph 2 of the Petitioner's supporting affidavit to the Petition. The same is dated 16<sup>th</sup> October, 1992. The said letter of offer informs the Petitioner that his application for a settlement plot has been successful and requires him to pay 10% deposit of the plot within 90 days failure of which would have led to the cancellation of the offer. The receipt for the payment of 10% deposit annexed to paragraph 4 of the Petitioner's supporting affidavit shows that the Petitioner paid the said deposit on 11<sup>th</sup> February, 1991. That was one year and 8 months before the letter of offer was issued to the Petitioner. Although the correspondence between the Petitioner and the 2<sup>nd</sup> Respondent marked as A3, A4, A5, A6, A7 and A8 shows that the Petitioner was allocated land, it was up to the Petitioner to explain the contradiction between the date of payment of the 10% deposit and subsequent issuance of the letter of offer. One wonders why the Petitioner would take it upon himself to pay 10% for that which had not been offered to him at the time of the payment. Arising from the above, one fails to understand the legitimate expectation that the Petitioner had that the 2<sup>nd</sup> Respondent would not interfere with what the Petitioner refers to legally sanctioned allocation taking into consideration that by the time of paying the 10% deposit, no letter of offer had been issued to him. It is therefore clear that the Petitioner has not demonstrated that there were constitutional violations.

16. Administrative law by **H.W.R Wade, C.F. Forsyth, Oxford University Press, 2000 at pages 449 to 450**, the subject of legitimate expectation is addressed as follows:-

*“it is not enough that an expectation should exist, it must be in addition be legitimate.... **First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation .... **Second**, the clear statutory words, of course, override an expectation howsoever founded .... **Third**, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy .... “*

*“An expectation, whose fulfillment require that a decision-maker should make an unlawful decision, cannot be legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.” (Emphasis added).*

17. It could not have been the policy of the Settlement Trust Fund or the 2<sup>nd</sup> Respondent to validate the Petitioner's act of paying a deposit for that which had not been offered to him as at February, 1991. It is not lost on me that the Interested Parties have not been given a chance on how they were allegedly allocated portions of plot number 184 Masongaleni Settlement Scheme and thus is would be unfair to condemn them unheard. I am therefore in agreement with the Counsel for the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents that the Petitioner has not furnished the Court with proof that he was allocated plot number 184 Masongaleni Settlement Scheme and as such, the petition lacks merits. I hereby proceed to dismiss it with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**Signed, Dated and Delivered at Makueni this 28<sup>th</sup> day of February, 2020.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hassan holding brief for Mr. E. K. Mutua for the Petitioner

No appearance for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Ms. C. Nzioka – Court Assistant

**MBOGO C. G., JUDGE,**

**28/02/2020.**