



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CONST. PETITION NO. 2B OF 2019**

**PATRICK MUKUNO KISILU.....1<sup>ST</sup> PETITIONER**

**SIMON MULUMBA.....2<sup>ND</sup> PETITIONER**

**RICKY MWENDWA.....3<sup>RD</sup> PETITIONER**

**ELIZABETH KAWEMBE.....4<sup>TH</sup> PETITIONER**

**JOYCE KAVATA.....5<sup>TH</sup> PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF KITUI.....1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE MEMBER FOR TRADE,**

**CO-OPERATIVES AND INVESTMENT.....2<sup>ND</sup> RESPONDENT**

**COUNTY EXECUTIVE MEMBER FOR LAND, INFRASTRUCTURE,**

**HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR .....4<sup>TH</sup> RESPONDENT**

**KISENGI NGUTHU .....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. In their Petition dated 8<sup>th</sup> January, 2019, the Petitioners averred that they are residents of Mutomo Location, Kitui County and that the proceedings herein relate to the unlawful and illegal seizure and alienation of plot numbers 80, 108, 185, 215, 224 and 241 in Mutomo market.

2. According to the Petitioners, the 1<sup>st</sup> Respondent allocated them plot numbers 241; 80 and 108; 185, 215 and 224 respectively; that they have paid the requisite fees, including land rates and charges and that on 27<sup>th</sup> June, 2018, and without prior notice, the 5<sup>th</sup> Respondent moved into their plots and commenced digging of holes around the whole of what used to be parcel number Mutomo/Kawelu/1323.

3. The Petitioners have averred that the seizure, entry and encroachment on their land by the 1<sup>st</sup> Respondent is a violation of Article 40(1) and (4) of the Constitution and that a declaration should issue that having vested them with the ownership of the suit properties, the entry, fencing off and development of the plots by the Respondents amounted to trespass and wrongful seizure and alienation of their plots.

4. The other orders that the Petitioners are seeking are: a declaration that the Respondents should pay them compensation; a mandatory injunction directing the 4<sup>th</sup> Respondent to process Title Deeds for their respective plots; and a permanent injunction restraining the Respondents from interfering with their rights to own the suit properties.

5. In response, the 1<sup>st</sup> Respondent's Municipal Manager deponed that the Petitioners have demonstrated or adduced evidence spelling out the specific omission or commission of the Respondents; that the contents of the Application are calculated to evict the Respondents to the

detriment of the 1<sup>st</sup> Respondent and that the Petition should be dismissed.

6. The Petition proceeded by way of written submissions. The Petitioners' advocate submitted that the allocation of the suit plots to the Petitioners was made by the then County Council of Kitui on 10<sup>th</sup> March, 2009; that the Petitioners paid all arrears that was owing to the then County Council of Kitui and that the suit plots are private and not public property.

7. Counsel submitted that the Affidavit by the purported official of the 1<sup>st</sup> Respondent does not address the evidence of the Petitioners; that the Petitioners' evidence remains uncontroverted and that the Petition should be allowed.

8. The Advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Petitioners have neither produced evidence to show that they are owners of the suit property nor provided proof of ownership of the suit properties. Counsel submitted that title to land normally comes into existence after issuance of a Letter of Allotment and fulfilment of the conditions of the said Letter of Allotment and that the Petitioners did not produce any Letters of Allotment.

9. The Petitioners' case is that they own plot numbers 241; 80 and 108; 185, 215 and 224 respectively. According to the Petitioners, they were allocated the said parcels of land by the then County Council of Kitui and that they are entitled to the said plots. In his Affidavit, the 1<sup>st</sup> Petitioner deponed that in its meeting held on 10<sup>th</sup> March, 2009, the then Town Planning and Markets Committee of the County Council of Kitui approved their Applications for allocation of the plots. The Minutes of 10<sup>th</sup> March, 2009 have been annexed on the Affidavit.

10. I have perused the Minutes of the then County Council of Kitui dated 10<sup>th</sup> March, 2009. The Minutes shows the "*Ordinary Works Town Planning and Markets Committee*" recommended the transfer of plots which had been declared vacant in Council markets to several individuals. The Petitioners were allocated the suit properties which were in the "*Southern Division*".

11. The Respondents have not disputed the existence of those Minutes. Indeed, the Respondents have not produced any evidence to show that the 1<sup>st</sup> Respondent's predecessor, the County Council of Kitui, did not allocate the suit properties to the Petitioners.

12. Indeed, the then 1<sup>st</sup> Respondent's County Clerk informed the Petitioners in writing that their Application for the vacant plots in Mutumo had been approved. The Petitioners have annexed the receipts showing the payments they made to the then County Council of Kitui.

13. Considering that the suit plots were allocated to the Petitioners by the 1<sup>st</sup> Respondent's predecessor, the rights of the Petitioners crystallized at that moment. Indeed, under the repealed Local Government Act, the then County Councils had the authority to dispose of any immovable property.

14. Having not disputed the Minutes of 10<sup>th</sup> March, 2009, and the Petitioners having continued to pay the requisite land rates to the 1<sup>st</sup> Respondent's predecessor, the 1<sup>st</sup> Respondent cannot purport to appropriate the parcels of land allocated to the Petitioners without following due process.

15. The proprietorship of the suit properties by the Petitioners is protected by Article 40(1) of the Constitution which provides as follows:

***"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***

***(a) of any description; and***

***(b) in any part of Kenya."***

16. The Respondents have not shown that the Petitioners acquired the suit plots from the 1<sup>st</sup> Respondent's unlawfully. That being the case, the Petitioners have established that they are entitled to the suit plots, and the same can only be appropriated by the Respondents upon payment of full compensation. For those reasons, I allow the Petitioners' Petition dated 8<sup>th</sup> January, 2019 as follows:

***a. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent's predecessor in law having vested the Petitioners with the ownership and/or proprietorship of plot numbers 80, 108, 185, 215, 224 and 241 in Mutumo market, Kitui, the entry, fencing off and development of the Petitioners' plots amounted to trespass and wrongful seizure and/or alienation of the Petitioners' plots.***

***b. A permanent injunction be and is hereby issued restraining the Respondents from interfering with the Petitioners' rights and interests in their respective plots, being plot numbers 80, 108, 185, 215, 224 and 241.***

***c. The 1<sup>st</sup> Respondent to pay the costs of the Petition.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**