



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC PETITION NO. 4 OF 2019**

**IN THE MATTER OF A CONSTITUTIONAL PETITION BY NELSON M. D HARUN PURSUANT  
TO ARTICLE 35(1) ON ACCESS TO INFORMATION, ARTICLE 40 ON PROTECTION OF  
RIGHT TO PROPERTY AND ARTICLE 47 ON RIGHT TO FAIR ADMINSTRATIVE ACTION**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (ACT NO. 4 OF 2015)**

**AND**

**IN THE MATTER OF THE LAND ACT (ACT NO. 6 OF 2012)**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT (ACT NO. 3 OF 2012)**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT OF KAJIADO**

**AND**

**IN THE MATTER OF PLOT NUMBERS C 152, C153, C302, C303, C886, C887**

**AND C888 NOONKOPIR SHOPPING CENTRE, KITENGELA**

**BETWEEN**

**NELSON MUTURI DUMBAYIA HARUN.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF KAJIADO.....RESPONDENT**

**JUDGMENT**

By a Petition dated the 26<sup>th</sup> February, 2019, the Petitioner prays for the following:

A. A declaration that the actions of the Respondent, its servants and/or agents in reallocating (if at all) the Petitioner's plots C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE KITENGELA, KAJIADO COUNTY without notice to the Petitioner and without according the Petitioner an opportunity to be heard and without resort to a court of law to sanction the Respondent's actions are illegal, unlawful, unreasonable and are contrary to the constitutional dictates on leadership and integrity, principles of governance. Values and principles of public service and thus unconstitutional, null and void.

B. An order of certiorari do issue removing into the High Court and quashing the Respondent's decision to repossess if at all and reallocate if at all the Petitioner's plots namely C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY.

C. An order of prohibition do issue restraining the Respondent whether by itself, its servants and/or agents from taking any steps to repossess and/or reallocate the Petitioner's plots namely C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY.

D. An order of mandamus do issue compelling the Respondent forthwith and unconditionally restore to the Respondent's register of plot owners in NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY the Petitioner as the legitimate and lawful owner of plots namely C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY and issue the Petitioner with New Allotment Letters.

- IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO PRAYERS B, C & D

E. A permanent injunction restraining the Respondent, its servants and/or agents and all claiming through the Respondent as allottees, assignees, licensees or howsoever claiming through the Respondent plots C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY from interfering with the Petitioner's quiet possession of the listed plots.

F. An order of mandatory injunction do issue directing the Respondent to forthwith and unconditionally restore the Petitioner's name to the register of plot owners plot numbers C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY and issue the Petitioner with New Allotment Letters.

G. Exemplary damages for the unconstitutional acts of the Respondent, its servants and /or agents and for gross violation of several statutes.

H. General damages for pain and suffering, mental anguish and agony and trauma visited upon the Petitioner by the Respondent, its servants and/or agents on the 2<sup>nd</sup> January, 2019 being the Petitioner's birthday.

I. Costs of this suit.

J. Any other or further relief that the Honourable Court may deem fit and just to grant.

The Respondent in response to the Petition filed Grounds of Opposition dated the 26<sup>th</sup> April, 2019 where it stated that:

1. That Petition does not disclose a reasonable cause of action against the Respondent.
2. That the Petitioner has not applied for Leave of Court as required by the Law.
3. That the nature of the prayers sought is such that Leave ought to be sought and granted.
4. That the Petitioner has not demonstrated the link between the Respondent and the plots. No. C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE.
5. That the said plots are not public utility plots.
6. That the Respondent is not in control of third parties who are alleged to have displaced the Applicant.
7. That the dispute in the Petition is between the Petitioner and third parties as per paragraph 15 of the Petition.
8. That the Respondent does not have any interest in the aforementioned plots.

The Respondent prayed that the Petition be dismissed.

The Petitioner and Respondent filed their respective submissions to canvass the Petition herein.

### **Analysis and Determination**

Upon consideration of the Petition, Grounds of Opposition, Annexures thereon and Submissions, the issue for determination is whether the Petitioner is entitled to the Orders sought in the Petition.

The Petitioner in his submissions contended that in the absence of the Respondent filing a replying affidavit his averments remain uncontroverted. He contended that there is no evidence that the documents of ownership in his name for plots No. C152, C153, C302, C303, C886, C887 and C 888 NOONKOPIR TRADING CENTRE are fraudulent. He further submitted that the Letters of Allotment exhibited in respect to the aforementioned parcels of land are unchallenged. Further, that the Respondent does not expressly deny that the Petitioner is the owner of the suit plots. On the issue of leave, the Petitioner submits that a Constitutional Court has repository power to grant judicial review

orders of mandamus, certiorari and prohibition. Further, that the rules on enforcement of rights and fundamental freedoms have not prescribed that a party seeking relief under article 22 of the Constitution must first obtain leave before proceeding further with the Petition. He reiterates that the Petition discloses a cause of action against the Respondent as he failed to respond to his letters as well as avail an Official Search as formally requested. He claims the Respondent has deprived as well as sanctioned the deprivation of his property and relied on Article 40 (3) of the Constitution. He avers that it is necessary to enjoin undisclosed parties once their identities are availed by the Respondent. Further, it is imprudent for the Respondent to allege the dispute is between the Petitioner and Third Parties and it has no interest in the subject plots yet it issued Letters of Allotment in respect to the plots. He confirms the Plots are rateable hence the Respondent cannot deny interest on the same. He states that the Respondents have failed to inform Court on the process it adopted to dispossess the Petitioner of the suit plots. The Petitioner filed further submissions where it noted that the Respondent's letter dated 4<sup>th</sup> July, 2019 which was filed in Court confirms existence of plots C152, C887 and C888. Further, that plots C153 is in the name of Joseph K. Njaramba while plots C 302 and C 303 are in the name of Alini General Agencies Limited. He further contends that the letter is silent on existence of plot C886. He explains that by confirming the ownership of plots C152, C887 and C888 is not validated and owner not known means the Respondent confirms having dispossessed the Petitioner ownership of the suit plots. Further, by confirming plots C 153, C302 and C 303 are in the names of persons other than the Petitioner, it confirms the Respondent has dispossessed him. He further submits that by failing to comment on plot C886, it confirms the said file is missing. The Petitioner summarized by stating that he has been physical occupation of the suit plots, fenced them, planted live fences and put up structures thereon while his kin has been undertaking farming on the plots for a period in excess of ten years.

The Respondent in his submissions has averred that the Petitioner should have sought for leave under Order 53 Rule 1 of the Civil Procedures before seeking orders of mandamus, prohibition and certiorari. He insists the Petitioner should have filed a normal Complaint as some of the parcels of land belong to third parties. He reiterates that the Petitioner has not demonstrated how his rights have been violated by the Respondent. Further, the Respondent gave the Petitioner conditions as per his letter dated the 20<sup>th</sup> February, 2019 but he refused to oblige.

Before I proceed to analyse the Petition, I note the Court granted an Order dated 15<sup>th</sup> January, 2020 allowing the Petitioner to effect service upon Alini General Agencies Limited and Joseph Kimani Njaramba the current registered Allottees of Plot Numbers C302, C303 and C153 respectively which he did vide the Daily Nation Newspaper of 31<sup>st</sup> January, 2020 but they failed to enter appearance as well as file a response to the Petition.

The Petitioner has sought for declaratory orders of Mandamus, Certiorari and Prohibition in respect to the suit plots. On the issue of leave, I hold that since this is a declaratory suit seeking relief under article 22 of the Constitution, the issue of leave is not required and this Court has the jurisdiction to grant the said orders of mandamus, certiorari and prohibition in accordance with the provisions of section 13 of the Environment and Land Court Act.

The Petitioner claims to be the owner of plots C152, C153, C302, C303, C886, C887 and C888 and annexed the respective Transfer Letters issued by the Respondent to his Replying affidavit. He explains that he acquired the suit plots from previous owners for valuable consideration in the years 2006, 2007, 2008 and 2009 and was issued with ownership documents by the Ol Kejuado County Council. Further, on 5<sup>th</sup> September, 2016 the Respondent's servant/ agent duly verified the Petitioner's ownership documents by stamping, dating including signing on them. He claims to have paid rates over the years as evidenced in the receipts annexed to the replying affidavit. Further, he has fenced the said suit plots with cedar posts as well as barbed wire and no one objected. He further erected a temporary stone house and his nephew takes care of the plots. The Petitioner avers that certain persons invaded some of the suit plots claiming ownership. Further, when he sought for searches from the Respondent, it declined to issue the same to him. He insists he has a constitutional right to access information. He avers that if his plots have to be allotted to other persons, then the Respondent's actions amount to arbitrary deprivation of his properties. Further, the Respondent has failed to respond to his letter dated the 28<sup>th</sup> January, 2019 in respect to verification of ownership of suit plots. From the annexures I note the Petitioner indeed has Transfer Letters in respect to the suit plots as follows: Plot No 1524 Business Noonkopir T Centre dated 25<sup>th</sup> August, 2006; Plot No 1525 Business Noonkopir T Centre dated 25<sup>th</sup> August, 2006; Plot No 1527 Business Noonkopir T Centre dated 22<sup>nd</sup> September, 2006; Plot No 1575 Business Noonkopir T Centre dated 25<sup>th</sup> August, 2006; Plot No 1526 Business Noonkopir T Centre dated 23<sup>rd</sup> January, 2007; Plot No 2169 Business Noonkopir T Centre dated 27<sup>th</sup> February, 2009; Plot No 1051 Business Noonkopir T Centre dated 10<sup>th</sup> April, 2008. He explains that after verification, the said plots were renamed C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE respectively. The Petition further annexed several receipts confirming he has been paying land rates to the Respondent to date. Further, I note he has also annexed the Rate Clearance Certificates for the respective plots. From the Respondent Grounds of Opposition and letter dated 4<sup>th</sup> July, 2019, except for confirming existence of the suit plots and indicating C152, C887 and C888 have not been validated. Further, C 153, C302 and C303 belong to third parties, it has not denied the Petitioner's averments nor disputed the Transfer Letters in the Petitioner's name in respect to the suit plots. The Respondent as the Allotting Authority that issued Transfer Letters to the Petitioner and continued to receive land rates from him, has failed to explain why it declined to issue Certificates of Official Searches to the Petitioner and the procedure it had adhered to in allotting some of the suit plots if at all, to third parties despite the fact that the Petitioner already held valid documents of title and was in possession of the said plots. The Respondent insisted that there is no cause of action against it but as the Allotting Authority, it is my considered view that there is and it should be held accountable for its actions.

**Article 47 of the Constitution provides that '(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.'**

From the legal provisions cited above, it is clear that the Respondent had an administrative role to play in respect to providing information to the Petitioner especially issuance of Certificates of Official Searches on the suit plots when he sought for them. Further, the Respondent also had an administrative role to inform the Petitioner who already held documents of title in respect to the suit plots in the event they intended to repossess the said plots and allocate to third parties. This role had to be in tandem with the provisions of the Land Registration Act, Fair Administrative Action Act as well as Article 47 of the Constitution. From the Respondent's response they seem to avoid responsibility and shift the blame to unknown third parties. It however does not explain how the said third parties acquired Letters of Allotment which had

already been issued to the Petitioner that was in occupation of the suit plots for over ten years.

In the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, the **Court of Appeal while highlighting the circumstances under which a Court can issue orders of mandamus cited, with approval, Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89** and stated thus:

**"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."**

Further, in the case of **Caroget Investment Limited V Aster Holdings Limited & 4 others (2019) eKLR**, the Court of Appeal while dealing with a dispute relating to letters of allotment held that: *'With the foregoing and the explicit and obvious admission by the Council that it had no interest in the suit property, the foundation of the appellant's title dissipated. The suit property was not available for alienation, especially after it had been acquired by the 1st respondent many years before the issuance of the second grant and indeed after its subsequent amalgamation with another property. The 1st respondent had surrendered to the Government the initial grant by a deed of surrender dated 2nd August, 2001 which was duly registered on 13th August, 2001 in exchange for a new grant I.R. number 86672 which was also registered. From the evidence on record and what we have said above, this was not a case of double allocation but one of shameless outright typical Kenyan-style land grabbing, where, the appellant, in collusion with some of the officials working for the 2nd to 5th respondents, attempted to alienate private land that already had been alienated.'*

Based on the legal provisions I have cited above and in relying on the two decisions, to my mind, I find that the suit plots were not available for allotment to third parties as the Petitioner already held documents of title which were not yet cancelled. I further find that the Respondent abdicated its responsibility since it gave no reason as to why it had denied the Petitioner the Certificate of Official Searches and allotted some of his plots to third parties when it knew fully well the Petitioner already held the documents of title, was in occupation of suit plots and paid rates to it. I find that the Respondent's actions actually violated the Petitioner's right to property as enshrined under article 40 of the Constitution. I further find that by denying the Petitioner the Certificates of Official Searches when he sought for them and declining to respond to his letter dated the 28<sup>th</sup> January, 2019, it violated the Petitioner's right to Fair Administrative Action as stipulated in Article 47 of the Constitution as well as right to information which is provided under Article 35 of the said Constitution. Since the Respondent did not controvert the averments herein, it amounts to an admission on its part and it is my considered view that the Respondent acted against the rules of Natural Justice and contravened the Constitutional principles of reasonability as well as procedural fairness.

The Petitioner has sought for damages as against the Respondent but since he is in occupation of the suit plots, I find that the burden of proof was upon him to provide evidence on the damages he had suffered as a result of the Respondent's actions, which to me I am persuaded he failed to discharge. In the circumstance, I am unable to award him any damages.

On the issue of costs, since this generally abides the outcome of the suit, I find that the Respondent should be made to bear the same.

It is against the foregoing that I find the Petition dated the 26<sup>th</sup> February, 2019 merited and will proceed to allow it in the following terms:

1. A declaration be and is hereby issued that the actions of the Respondent, its servants and/or agents in reallocating (if at all) the Petitioner's plots C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE KITENGELA, KAJIADO COUNTY without notice to the Petitioner and without according him an opportunity to be heard are unconstitutional, null and void.
2. An order of certiorari be and is hereby issued quashing the Respondent's decision to repossess if at all and reallocate if at all the Petitioner's plots namely C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY.
3. An order of prohibition be and is hereby issued restraining the Respondent whether by itself, its servants and/or agents from taking any steps to repossess and/or reallocate the Petitioner's plots namely C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY.
4. An order of mandamus be and is hereby issued compelling the Respondent forthwith and unconditionally restore to the Respondent's register of plot owners in NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY the Petitioner as the legitimate and lawful owner of plots namely C152, C153, C302, C303, C886, C887 and C888 NOONKOPIR TRADING CENTRE, KITENGELA, KAJIADO COUNTY and issue the Petitioner with New Allotment Letters.
5. Costs of this Petition is awarded to the Petitioner

**Dated signed and delivered via email this 28<sup>th</sup> day of May 2020**

**CHRISTINE OCHIENG**

**JUDGE**