



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC PETITION NO. 5 OF 2019**

**GERISHOM NDEGE**

**ERIMA.....PETITIONER**

**VERSUS**

**TRANS-NZOIA COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER.....1<sup>ST</sup>  
RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT OFFICER.....2<sup>ND</sup>  
RESPONDENT**

**AND**

**MARONDA NICHOLAS ONGERA.....INTERESTED  
PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner herein vide his Petition dated 3/4/2019 and filed in court on 5/4/2019 is seeking the following remedies:

**a. A declaration that the Petitioner is the lawful allottee of plot No. 590, Kapkoi Settlement Scheme measuring approximately 5 acres or thereabout.**

**b. An order of mandatory injunction requiring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to process all requisite documents including a Discharge of Charge and transfer documents in favour of the Petitioner and transmit the same to the Land Registrar, Trans-Nzoia, for purposes of issuance of a Title Deed or Certificate of title to the Petitioner.**

**c. Costs of the Petition and interest thereon.**

2. The instant petition is supported by an affidavit titled “*verifying affidavit of Gerishom Ndege Erima*” sworn on 4/4/2019.

3. The petition is opposed by the Respondents. Through the office of the Attorney General, they filed a response to the Petition dated 11/10/2019 and filed in court on 17/10/2019.

4. The Interested Party despite being served never entered appearance.

### **Petitioner's Case**

5. The petitioner contends that vide a letter of allotment dated **27/7/1984**, the Settlement Fund Trustees allocated him that parcel of land known as **Plot No. 590, Kapkoi Settlement Scheme**.

6. The petitioner has stated further that following the said allocation, he took possession of the land and has since retained occupation of the suit land after paying all the requisite charges, fees and interest in favour of the Settlement Fund Trustees.

7. It is stated that on **1/4/2019**, the petitioner upon visiting the land offices in Nairobi in a bid to process his discharge of charge, he discovered that the interested party was in the process of illegally and/or fraudulently discharging the same parcel of land had obtained title documents in his favour.

8. As a result of the foregoing the petitioner preferred the instant petition seeking the forestated reliefs.

### **Respondents' Response to the Petition**

9. The Respondents are opposed to the instant petition vide replying affidavit sworn by State Counsel **Muthanze Lung'u** on **11/10/2019**. It is deposed that the petitioner was indeed allocated plot No. **590 in Kapkoi Settlement Scheme** measuring **5 acres** in **1982** upon payment of **10%** of the total amount required in **1987** and that the charge was executed on **8/12/1989**.

10. It is deposed further that the Petitioner did not make further payments as required until **15/3/2019** way after the expiry of the stipulated time and that as a result of the Petitioner's non-compliance with timelines, the respondents reallocated the suit property to the interested party on **21/2/2014**.

11. It is deposed that the interested party paid the full amount required to the respondents and was issued with the Certificate of Outright Purchase in **2014**.

12. It was further deposed that the reallocation to the interested party was entirely based on Petitioner's failure to make payments on time and thus none of his constitutional rights was infringed.

13. The court was urged to dismiss the Petition herein with costs lack of merit.

### **The Interested Party's Response.**

14. The interested party did not file any response to the petition despite service.

### **Submissions**

15. The court ordered the parties to file their respective submissions. The petitioner through Katama Ngeywa & Co. Advocates filed his written submissions on **8/5/2020** but on perusing the court file, I note that the respondents have not filed theirs.

16. In view of the pleadings and the submissions tendered herein, I find the following issues to be salient and hence worthy deliberation.

### **17. Issues For Determination**

**a. Whether the land in issue was allocated to the Petitioner and subsequently reallocated to the interested party.**

**b. Whether the reallocation of the suit land to the interested party was in violation of the constitutional rights of the petitioner.**

**c. What orders should issue?**

18. The issues are addressed as hereunder.

**a. Whether the land in issue was originally allocated to the Petitioner and subsequently reallocated to the interested party**

19. There is no doubt that the land in issue was allocated to the petitioner in the year **1984** vide a letter of allotment dated **27<sup>th</sup> July 1984** as that has been admitted by the respondents and the interested party has not appeared to present before court evidence to the contrary. The respondents have also conceded that the same land allocated to the petitioner was reallocated to the interested party.

**b. Whether the reallocation of the suit land to the interested party was in violation of the constitutional rights of the petitioner**

20. The petitioner's claim is founded on allegations of violation of his constitutional rights. The petitioner has argued that the purported reallocation of the suit land to the interested party on **21/2/2014** was illegal and irregular.

21. The petitioner has argued that the offer by the Respondent to the interested party was invalid *ab initio* for the reason that it was issued in **2014** with full knowledge that the petitioner was in occupation of the suit land having been allocated the same way back in **1984** and that the allotment letter had never been recalled, revoked and/or cancelled at any time by the respondents.

22. It is further averred that the demand by the respondents to the petitioner for payment of the balance over the same allocated land in **2019** alleged to have been re-allocated in **2014** to the interested party is clear manifestation of who the rightful owner of the suit land is.

23. I have perused the said demand letter marked **GNE-4** in the annexures to the supporting affidavit of the Petition. It would appear by that letter that the respondents still recognized the petitioner's ownership of the land as at the date **23/1/2019**. Further evidence that the respondents acknowledge that the petitioner owns the land is the acceptance of the payment of dues made by the petitioner on **15/3/2019**, a copy of the receipt for which has been placed in the court record by both the petitioner and the respondents. No dispute therefore arises as to whether the petitioner owned the land after **2014**, the year the interested party was allegedly re-allocated the land.

24. This court is convinced that in view of that letter which has not been controverted by the respondents the alleged allocation of the land to the interested party in **2014** is a ruse intended to illegally and irregularly deprive the petitioner of his land.

**25. In Rukaya Ali Mohamed -vs- David Gikonyo Nambacha & Another (Kisumu HCCA No. 9 of 2009:- Justice Warsame** as he then was pronounced himself on a similar issue and held:

**“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against the public interest.”**

26. It therefore follows that where land has been validly allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.

27. Consequently, when the Petitioner was allocated the land sometimes in **1984**, he acquired a legal interest and therefore the respondents could not just reallocate the same to the interested party unprocedurally as is the case.

28. The respondents and the interested party have failed to demonstrate before this court that the letter of allotment to the petitioner was ever validly cancelled or that the petitioner had ever been alerted of such cancellation or any intention to cancel that it. The petitioner is settled on the land, and has been so settled for a long time. The respondents never showed a ground report as evidence that he was not so settled. Any interference with the allotment to the petitioner in the circumstances amounts to a violation of his right to own property under **Article 40 (1)** of the **Constitution** and also amounts to arbitrary deprivation of his rights to property in violation of the provisions of **Article 40(3)** of the **Constitution**.

29. The upshot of all this is that I find merit in the petition. I therefore allow the petition in terms of **Prayers Nos. (a), (b) and (c)** thereof.

**Dated, signed and delivered at Kitale via electronic mail on this 14<sup>th</sup> day of October, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**