



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. 1 OF 2016**

**IN THE MATTER OF ARTICLES 22, 23, 27, 40, 47 & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ACT**

**AND**

**IN THE MATTER OF THE RULES OF NATURAL JUSTICE**

**JAPHETH OKUMU OLUAL.....PETITIONER**

**VERSUS**

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

**THE KISUMU COUNTY EXECUTIVE MEMBER FOR HEALTH.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. Japheth Okumu Olual, the Petitioner, filed the petition dated 12<sup>th</sup> May 2016 seeking for the following;

- a. “A declaration that the acquisition of the petitioner’s property known as PLOT B on plan No. N251/85/1 by the 1<sup>st</sup> respondent for the construction of the Muhoroni Sub-county hospital without consultation of the petitioner is illegal and null and void.
- b. A declaration that the acquisition of the petitioner’s property known as PLOT B on plan No. N251/85/1 by the 1<sup>st</sup> respondent for the construction of the Muhoroni Sub- County hospital without compensation of the petitioner is illegal and null and void.
- c. A declaration that the petitioner is the bona-fide owner of the suit property situate within Muhoroni Township and more particularly known as PLOT B on plan No. N251/85/1.
- d. An order of permanent injunction stopping the respondents from starting and/or carrying on construction work or dealing with the suit property in any manner prejudicial to the petitioner.
- e. An order compelling the 1<sup>st</sup> and 3<sup>rd</sup> respondent to facilitate transfer of the suit property to the petitioner.
- f. In the alternative and without prejudice to the foregoing, an order compelling the respondents to compensate the petitioner in accordance with the law for acquisition of his property.
- g. Costs of this petition.”

2. The Petitioner set out the following as the grounds of the petition;

a) That the Government of Kenya allotted him Plot B on plan No. N251/85/1 vide letter of allotment dated the 206<sup>th</sup> November 1997.

b) That he accepted the offer and paid to the then Town Council of Muhoroni the fees for survey, demarcation, conveyance and registration but the said council kept on giving excuses why it had not issued him with the lease.

c) That following the promulgation of the new Constitution 2010, the assets and liabilities of Muhoroni Town Council were taken over by the County Government of Kisumu, the 1<sup>st</sup> Respondent, whose devolved functions includes health services.

d) That in 2015, the 1<sup>st</sup> Respondent trespassed onto the plot and commenced constructing an extension of Muhoroni Sub-County hospital.

e) That the 1<sup>st</sup> Respondent's action amounted to a contravention of the "*Petitioner's right to equal protection and enjoyment of the law (Article 27 of the Constitution), right to acquire and own private property (Article 40 of the Constitution), right to fair administrative action (Article 47 of the Constitution), and right to be heard in a matter affecting him (Article 50 of the Constitution of Kenya and Rules of Natural Justice).*"

f) That the Petitioner was not consulted or compensated before his plot was taken over by the 1<sup>st</sup> Respondent, who has ignored the Petitioner's efforts for an amicable settlement.

3. The petition is opposed by the County Government of Kisumu and the Kisumu CEC Health, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, through the replying affidavit sworn by Solomon Mwangi, the County Physical Planner with the 1<sup>st</sup> Respondent, on the 3<sup>rd</sup> October 2016 among other deposing as follows;

a) That only the certificate of lease to a property confers absolute and indefeasible ownership.

b) That plot B was under Temporary Occupation Licence (TOL) and did not confer registrable rights over part of the community land earmarked for hospital, school and social centre.

c) That the Petitioner has not exhibited evidence that he accepted the offer and paid the Kshs. 11,340/= to the Commissioner of Lands within the 30 days of the letter of allotment.

d) That the allocation of the plot to the 1<sup>st</sup> Respondent was procedurally done without any objections being raised within the 60 (sixty) days of the advertisement of the Part Development Plan. (PDP)

e) That the claim for compensation is statute barred under Section 85 (1) of the Land Registration Act No. 3 of 2012.

4. The petition came up for hearing on the 30<sup>th</sup> May 2018 when directions on filing and exchanging written submissions were given. Consequently, the Petitioner's Counsel filed their written submission dated the 25<sup>th</sup> July 2018, while Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed theirs dated the 21<sup>st</sup> November 2018.

5. That though the National Land Commission is named as the 3<sup>rd</sup> Respondent, there is no evidence of service of the petition upon it. That the hearing of the petition proceeded without the Petitioner's Counsel addressing the court on that issue.

6. The following are the issues for the court's determinations;

a) Whether the Petitioner was allocated the Plot B, that is currently being used by the 1<sup>st</sup> Respondent for extension of a Maternity Wing for Muhoroni Sub-District hospital.

b) Whether the Petitioner had accepted and made payments required under the letter of allotment dated the 26<sup>th</sup> January 1997.

c) Whether the Petitioner has proved infringement or contravention of his rights under Articles 27, 40, 47 and 50 of the Constitution and, if so what prayers to grant.

d) Who pays the costs of the petition.

7. The Court has carefully considered the grounds on the petition, the affidavit evidence and annexures thereto, the written submissions by the two learned Counsel, and come to the following determinations;

a) That the Petitioner's claim to Plot B is based on the Letter of Allotment dated the 26<sup>th</sup> January 1997, under reference No. 26286/VII/29, by the Commissioner of Lands, receipts No. 14699 and 14698 both dated 22<sup>nd</sup> March 2006 for a total of Kshs. 10,300/= issued by Muhoroni Town Council, and letters dated 1<sup>st</sup> October 2006, 8<sup>th</sup> November 2006, 3<sup>rd</sup> November 2006, 21<sup>st</sup> November 2006, 27<sup>th</sup> November 2006, 8<sup>th</sup> July 2011 and 1<sup>st</sup> December 2015 that are attached to his supporting affidavit sworn on the 12<sup>th</sup> July 2016.

- b) That the letter of Allotment dated the 26<sup>th</sup> January 1997 offered allocation of “**Unsurveyed Residential Plot No. B- Muhoroni**” to the Petitioner for a term of 99 years from 1<sup>st</sup> February 1997 upon complying with the condition set out under **clause 2** within thirty (30) days. The first condition was receipt of an acceptance of the conditions and payment of the fees set out of Kshs. 11340/= within 30 (thirty) days. There are other conditions relating to developments to be carried on the plot.
- c) That the two receipts No. 14699 and 14698 dated the 22<sup>nd</sup> March 2006 for Kshs. 10,300/= were made to Muhoroni Town Council, the predecessor of the 1<sup>st</sup> Respondent, and the payments therein cannot be the ones required under **clause 2 of the Letter of Allotment** dated the 26<sup>th</sup> January 1997. That is because the payments required under the letter of allotment were to be made to the Commissioner of Lands and there is no evidence tendered by the Petitioner that he made that payment at all, leave alone within the 30 days as required. That even if the Petitioner wanted to pass the payment under the two receipts to have been the payments required under the Letter of Allotment, the payment was about nine (9) years after the date of the Letter of Allotment. That by then the offer of allotment had lapsed at the expiry of 30 days without acceptance and payment being received by the Commissioner.
- d) That the receipt no. 14698 dated 22<sup>nd</sup> March 2006 for Kshs. 6,750/= has a note at the left top area reading “**TOL NO. 0282114 PLOT NO. B**” which leads the court to conclude that the rates payment made under it were in respect of a temporary occupation licence (TOL) plot issued by the Town Council, and not the one offered under the Letter of Allotment dated the 26<sup>th</sup> January 1997, whose term was 99 years. That receipt, and the other one No. 14699 for Kshs. 3550/= were for payments not related to the Letter of Allotment dated the 26<sup>th</sup> January 1997.
- e) That in view of the finding that the Petitioner has not tendered proof that he had forwarded an acceptance and payments required under the Letter of Allotment dated the 26<sup>th</sup> January 1997 within 30 days of the date of the said letter, then he never acquired any registrable rights over the plot described therein. That the allocation of the plot to the 1<sup>st</sup> Respondent, their taking of possession and commencing development therein cannot be said to have amounted to an infringement or contravention of the Petitioner’s rights to protection under the law, or to own property, or fair administrative action and right to be heard; as the offer for Plot B had lapsed for failure to comply with the conditions of acceptance and payment therein.
- f) That the breakdown in the receipt No. 14699 dated the 22<sup>nd</sup> March 2006 shows the Kshs. 3,550/= was for “**plot application, demarcation and administrative fees**” while receipt No. 14698 was for “**rates upto 2006**” which are different items those set out in the Letter of Allotment dated the 26<sup>th</sup> January 1997. That in any case, if the payments under the two receipts were meant to be pursuant to the Letter of Allotment dated the 26<sup>th</sup> January 1997, then they would have been for the items in the Letter of Allotment.
- g) That contrary to the submission by Counsel for the Petitioner, the findings above shows that the acceptance of the conditions and payments required under the Letter of Allotment dated the 26<sup>th</sup> January 1997, were not made within 30 (thirty) days as required, and the offer therefore lapsed without the Petitioner acquiring any registrable rights over the plot described therein. The Letter of Allotment was part of the process of allocation of the plot and subject to the Petitioner’s complying with the conditions therein. That had the Petitioner complied with the condition, it would have led to a lease being prepared and after registration, a certificate of lease (title) would have been issued. (See **Wreck Motors Enterprises vs The Commissioner of Lands and 3 Others [1997] eKLR**. That further the Petitioner do not appear to have taken possession of the plot from the date of the Letter of Allotment in 1997 to the 2015, when he found the 1<sup>st</sup> Respondent was constructing a maternity facility for Muhoroni Sub District hospital on it.
- h) That as the Petitioner herein had not complied with the conditions set in the Letter of Allotment within the time given therein, the plot described therein was available for allocation by the allotting authority, when the 1<sup>st</sup> Respondent acquired it. That in the case of **Rukaya Ali Mohamed vs David Gikonyo Nambacha & Another HCCA No. 9 of 2004** the Court held that once allotment letter is issued and allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers 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 out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.
- i) That further to (h) above, and in view of the finding that the offer of the plot to the Petitioner lapsed after 30 days of the date of the Letter of Allotment, the acquisition of the plot by the 1<sup>st</sup> Respondent for the purpose of a hospital extension appear to have been legally, regularly and procedurally acquired. The Petitioner did not raise any objection to the acquisition process when the Part Development Plan (PDP) was advertised.
- j) That this court is with Jurisdiction to hear and determine constitutional petitions relating to land and or environment as was held in **Christopher Ngunu Mulwa & 28 Others vs County Government of Kitui & 2 Others [2017] eKLR** where Angote J, cited with approval. The Supreme Court decision in **Republic vs Karisa Chengo & Others, Supreme Court Petition No. 5 of 2015** and stated as follows;
- “Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters... For those reasons, the Respondents’ objection that this court does not have jurisdiction to determine the petition before it is unmeritorious. Indeed, it is only this court that has the jurisdiction to hear land disputes, notwithstanding how those disputes are commenced.”**
- k) That though the 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleged that the Petitioner had fraudulently obtained allocation of the suit plot, no evidence was adduced in support of the allegation. That the Petitioner is only failing in his pursuit to claim ownership of the plot because he failed to comply with the conditions contained in the Letter of Allotment leading to the offer lapsing.
- l) That in view of the foregoing, the Petitioner has failed to proof any infringement or contravention of his constitutional and

fundamental rights, or that he deserves to have any of the declaratory prayers issued in his favor. He has also failed to show that the Respondents should be enjoined from dealing with the suit property, or that the said property should be transferred to his name or that he is entitled to any compensation.

m) That in view of the correspondence between the Petitioner on one part, and 1<sup>st</sup> respondent on the other part, before the filing of this petition, and as the 3<sup>rd</sup> Respondent did not participate in the proceedings, the court is of the view that each party bears their own costs.

8. That flowing from the above findings, this petition is without merit and is hereby dismissed with each party bearing their own costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH 2019

**In the presence of:**

Petitioner     Absent

Respondents     Absent

Counsel     M/s Ayieta for Maua for Petitioner

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**