

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC PET NO. E001 OF 2023

PETER WANGO NGUGI.....1ST PETITIONER
PAUL MIGHULO MSABAA.....2ND PETITIONER

VERSUS

HON. BADI TWALIB.....1ST RESPONDENT
BAKARI MWAKIFUNDI.....2ND RESPONDENT
HAMADI BAKARI.....3RD RESPONDENT
COUNTY GOVERNMENT OF MOMBASA.....4TH
RESPONDENT
CHIEF OFFICER LAND PLANNING AND HOUSING
MOMBASA COUNTY.....5TH
RESPONDENT

AND

NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY.....1ST INTERESTED
PARTY
THE NATIONAL LANDS COMMISSION..... 2ND INTERESTED
PARTY

JUDGMENT

A. Petitioners' claim

1. By a petition dated 04.01.2023 expressed to be brought pursuant to Articles 22 (1) and 23 (1) of the Constitution the petitioner sought the following reliefs against the respondents;

a) A Declaration that the 4th Respondent violated the law in failing to procure the National Lands commission approval prior to allocating the land to the 1st, 2nd & 3rd Respondents.

- b) *A Declaration that the 1st, 2nd & 3rd Respondents violated the law and the constitution in failing to conduct public participation prior to beginning the construction of the said purported offices.*
- c) *A Declaration that the Respondents violated the law in failing to seek and get consents and/or approvals from all the interested parties herein that must regulate such a project e.g. The National Lands Commission, National Environment Management Authority who must give their input and consent as provided by the law.*
- d) *A Permanent Order of injunction restraining the 1st, 2nd & 3rd Respondents from utilizing the said land for building a chief's office*
- e) *Such other and / or further relief as this Honourable court may deem fit and just to grant.*
- f) *The costs of and occasioned by this Petition to be provided for.*

2. The petitioners alleged contravention of Articles 40, 42, 48, 50(1) and 70 of the Constitution, violation of Section 5 of the National Land Commission Act as well Sections 4, 6, 7, 9 and 134 of the Land Act by the respondents. The petitioners pleaded that the 4th respondent had acted illegally, unprocedurally and unconstitutionally by allocating public land in Jomvu constituency in Mombasa to the 1st respondent on which the latter was constructing a private commercial building in the guise of upgrading a chief's office. It was further pleaded that the

construction was being undertaken on the said land before any public participation could be conducted and before the requisite regulatory approvals were granted by the 1st interested party.

3. The petitioners pleaded that the said allocation was undertaken by the 4th respondent without involving the 2nd interested party which is legally mandated to allocate and manage public land on behalf of the national and county governments. It was also pleaded that, in any event, the subject land was always set apart and used as a parking and children's playground. The petitioners further contended that the allocation given to the 1st respondent was for land located in Kwa Shee area in Jomvu and not Kwa Mwanzia area in Jomvu where the construction was being undertaken.

B. Responses by the respondents

4. There is no indication on record of the 1st defendant having filed a response or answer to the petition. Upon perusal of the court file, the court is unable to find any credible evidence of service of the petition upon the 1st respondent at all.
5. There is on record an affidavit of service sworn by a process server called Peter O. Omogi on 17.01.2023. In paragraph 2 thereof, he deposed that on 11.01.2023 he received copies of a notice of

motion dated 04.01.2023 and a notice of change of advocates from the firm of Mkan & Co Advocates with instruction, to serve the respondents. He also deposed in paragraph 5 thereof that he received a copy of a court order issued 13.01.2023 for service upon the respondents. There was no mention of the process server having received a copy of the **petition** for service. In paragraph 10 of the said affidavit he deposed as follows regarding service upon the 1st respondent;

“THAT on 17th January 2023 at around 4.50am, as directed by the petitioners herein I proceeded to the 1st respondent’s CDF office situated at Mikindani, near Mikindani Police Office, Mombasa and on arrival I found a gentleman and upon my explanation about the purpose of my visit and inquiring the whereabouts of the 1st respondent, he too identified himself as Jack the personal assistant of the 1st respondent and accepted having instructions to receive such documents on behalf of the 1st respondent while away “ as only being known to me at the time of this service” thereafter I tendered to him the court pleadings herein, he perused, accepted this service but declined to acknowledge receipt on the returned copies”

6. The material on record shows that the 2nd and 3rd respondents entered appearance through the office of Attorney General on 17.03.2023. However, by the time of preparation of the judgment the AG had not filed any answer or response to the petition. The

only affidavit on record by the 2nd respondent is a replying affidavit in response to the petitioners' application for contempt of court.

7. The record also shows that the 4th respondent entered appearance through the county attorney on or about 15.02.2023 but did not file any response to the petition.
8. There is no appearance or response filed by the 5th respondent and the 1st and 2nd interested parties despite service.

C. Directions on submissions

9. When the petition was listed for directions it was directed that the petition shall be canvassed through affidavit evidence and written submissions only. The respondents were also granted leave to file and serve their answers to the petition. The record shows that the petitioner filed written submissions dated 05.03.2025 but the respondents had not filed any by the time of preparation of the judgement

D. Issues for determination

10. The court has perused the petition herein without the benefit of responses from the 5 respondents and the interested parties. The 1st respondent cannot be faulted for having failed to respond to

the petition since there is no credible evidence on record to show that he was served with the petition.

11. The court is thus of the view that the following are the key issues which arise for determination in the petition;

- a) *Whether the 1st respondent was served or properly served with the petition.*
- b) *Whether the allocation or purported allocation of public land to the 1st respondent was illegal, irregular and unconstitutional.*
- c) *Whether the construction of the chief's in Jomvu is in violation of the Constitution and other applicable laws.*
- d) *Whether the petitioners are entitled to the reliefs sought in the petition.*
- e) *Who shall bear costs of the petition.*

E. Analysis and determination

- a) **Whether the 1st respondent was served or properly served with the petition**

12. As indicated before, there is no credible evidence of service of the petition upon the 1st respondent who is alleged to have been allocated the public land the subject of the petition. In his affidavit of service, the process server indicated that he received copies of the notice of motion dated 04.01.2023, a notice of change of advocates and a copy of a court order issued on 13.01.2023 for service upon the 1st respondent. He did not receive a copy of the

petition for service and he did not depose anywhere in the affidavit of service that he served a copy of the petition upon the 1st respondent. The vague reference to the generic term “pleadings” in paragraph 10 of the affidavit of service does not disclose the nature and description of the documents allegedly served.

13. The court is further of the opinion that even if the process server had received a copy of the petition for service upon the 1st respondents, the process server awfully failed in his duty to effect proper service upon the 1st respondent as required by law. The process server did not even make a single attempt to trace the whereabouts of the 1st respondent before leaving whatever documents he had with someone called “Jack”. The process server did not make a second attempt to serve the 1st respondent upon failing to find him at the CDF office at Jomvu. He simply left the documents he had with someone he believed to be his personal assistant without disclosing the basis upon which he concluded that he was actually such an assistant.

14. In the premises, the court takes the view that the instant petition cannot be adjudicated upon in the absence of the 1st respondent who is alleged to have been allocated public land. It would be

against the rules of natural justice to adjudicate this petition in the absence of the 1st respondent. On that account, this petition ought to fail.

b) **Whether the allocation or purported allocation of public land to the 1st respondent was illegal, irregular and unconstitutional**

15. Even if the court had found that the 1st respondent was properly served with the petition, the court is barely satisfied that there is sufficient material on record to support the petition. First, there is absolutely no credible evidence of the alleged **allocation** of public land to the 1st respondent. Second, there is absolutely no credible evidence of the alleged reservation or setting apart of the said land for a parking lot or children's playground.

16. The only document exhibited by the petitioners in a bid to demonstrate the alleged allocation was a letter dated 22.11.2022 from the 4th respondent to the 1st respondent. The said letter stated thus;

*Hon. Badi Twalib
Member of Parliament
Jomvu*

Dear Mheshimiwa,

**RE: MODERNAZITION OF ASSISTANT CHIEF'S OFFICE AT
KWA SHEE JOMVU SUB-COUNTY**

Receive greetings and compliments from the County Government of Mombasa.

Further to a letter from the Department of Land Planning and Housing on the above subject, this is to inform you that your request to put up a chief's office in Mikindani site and service scheme is hereby approved.

However, the same will be subject to public participation as per the requirements of the law.

Yours faithfully

*Dr. Noah Akal
For Governor
Mombasa County*

17. The plain meaning of the said letter was merely to communicate approval of the intended project, subject to public participation being undertaken. It cannot, by any stretch of imagination, be construed to mean an allocation of public land at all. There is a world of difference between granting **approval** for an intended project and **allocation** of public land.
18. The court is unable to find any iota of evidence to demonstrate that the disputed land was ever set apart or reserved for a parking lot or a playground. The petitioners did not exhibit copies of any development plan, part development plan, survey plan or any reservation or setting-apart document to support their claim. A bare statement in a petition cannot possibly prove a matter

governed by planning laws even where the respondents have failed to file answers to a petition.

19. It has been held that the burden of proof in civil matters does not necessarily change simply because the respondent has failed to file a response. Section 107 (1) of the Evidence Act (Cap 8)) stipulates as follows;

“ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

20. In the case of *Daniel Toroitict Arap Moi vs Mwangi Stephen Mureithi & Another [2014] eKLR* it was held *inter alia*, that;

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side”

21. The upshot of the foregoing is that the petitioners' case must fail both on account of failure to serve the 1st respondent and failure

to establish the factual basis of the petition. The court finds no need to consider the rest of the issues identified earlier.

F. Conclusion and disposal orders

22. The upshot of the foregoing is that the court and holds that the petition must fail for reasons given in the judgment. Consequently, the court makes the following disposal orders;

- a) ***The petition dated 04.01.2023 is hereby dismissed in its entirety.***
- b) ***For the avoidance of doubt, any interim orders in place are hereby vacated.***
- c) ***Each party shall bear their costs.***

It is so decided.

Judgment dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **20th day of November 2025** in the presence/absence of the parties as indicated below.

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Y. M. ANGIMA
JUDGE

In the presence of:

Gillian - Court assistant
Mr. Mkan for the petitioners
No appearance for the 1st respondent
Ms. Ambetsa for the AG for the 2nd and 3rd respondents
No appearance for the 4th and 5th respondents
Mr. Maina for the 1st interested party

No appearance for the 2nd interested party

ORIGINAL