

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO. 9 OF 2021

formerly
THIKA ELC PETITION NO. 10 OF 2020

MARY NJERI KAMUNGE

PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI

RESPONDENT

JUDGEMENT

1. The Petitioner commenced this suit vide her petition dated 19th August 2020. She claimed that she was allotted an unsurveyed commercial cum Residential **Plot "A" Dagoretti/Mutuini Nairobi**, by the Commissioner of Lands but the Respondent has deliberately delayed to process her Lease despite acknowledging that she is owner. It is her case that in total disregard of her property rights, the Respondent has fenced her parcel alongside its adjacent plot, which is

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developed with a health facility. She therefore sought for the following Orders:

- a) A declaration that the Respondent acted illegally in encroaching and trespassing on the Petitioner's land (unsurveyed commercial cum Residential Plot "A" Dagoretti/Mutuini Nairobi).**
- b) A mandatory order that land parcel No. unsurveyed commercial cum Residential plot "A" Dagoretti/Mutuini Nairobi measuring 0.04 Hectares belongs to the Petitioner and compensation do issue for loss of use of the same.**
- c) Mandatory order evicting the Respondent from land parcel No. Unsurveyed commercial cum Residential plot "A" Dagoretti/Mutuini Nairobi and injuncting the Respondent, its agents, employees and or any other person working under the Respondent or with instructions of the Respondent from trespassing, constructing, encroaching or in any other way interfering with**

the land parcel no. unsurveyed commercial cum residential plot “A” Dagoretti/Mutuini Nairobi.

d) A Mandatory order to the Respondent to re parcel or re allocate the Petitioner land measuring 0.04 Ha on its land adjacent /next to the Petitioner’s land.

e) That this Honourable court gives any other orders required to advance the cause of justice in this case.

f) That costs of this petition be borne jointly and severally by the Respondent.

2. In opposition, the Respondent filed a ‘response to the petition’, in which it denied allegations levelled against in the petition. It admitted to having erected a health facility but denied allegations of fencing off the petitioner’s plot.

3. It also contended that the survey map for **Dagoretti/Mutuini** indicates that **Dagoretti/Mutuini/486** is a public utility parcel thus the petitioner’s interest cannot be protected under Article 40 of the Constitution.

4. The petition was canvassed through viva voce evidence.

Evidence of the Petitioner

5. The Petitioner testified as PW1. She adopted her supporting affidavit to the petition as her evidence in chief and produced her list and bundle of documents dated 28th March 2022 as P. Exhibit 1-6.
6. She testified that on 2nd September 1993, she was allotted unsurveyed commercial cum residential **Plot "A" Dagorreti/Mutuini**, Nairobi by the Commissioner of Lands. Subsequently, she paid for it and was issued with a receipt. She explains that the plot was then surveyed and its area ascertained as 0.04 Hectares but the processing of the Lease has never been finalized and or has been interfered with, owing to the fact that she has not been able to trace its records at the Ministry of Lands.

7. She insisted that the provincial surveyor, Nairobi appreciated and recognized the existence of her plot. Further, that the Respondent developed a health facility on its land, which is adjacent to hers and fenced off her plot in total disregard to her constitutional rights to property.
8. In cross-examination, PW1 insisted that she sent a formal acceptance letter to the letter of allotment dated 2nd September 1993 but she did not file it in Court as it is with the Ministry of Lands. She reiterated that she has not been issued with a Certificate of Lease and that the sketch map she produced, in which her plot is indicated as 'Shop A' emanated from the Ministry of Lands.
9. She also said that she erected a timber structure on her suit plot but it was removed. Further, that despite the Ministry of Lands directing the District Surveyor to survey the plot vide its letter dated 31st August 1995, they never undertook the survey. She explained that she was not given a Beacon

Certificate to identify the boundaries either but the records at the Lands office shows her plot exists. She stated that she paid lease processing fees yet the Respondent and the County Government are yet to process her title.

Evidence of the Respondent

- 10.** DW1 Cecilia W Koigi, described herself as a surveyor and Chief Officer, Lands at the Respondent. She produced the Respondent's list and bundle of documents which contained a Letter dated 2nd November 2021 and a survey map as D. Exhibit 1 and 2.
- 11.** It was her testimony that **LR No. Dagoretti/Mutuini/486** is not subdivided and had been set aside as a public utility plot, thus it could not be allocated to any person as a commercial plot. She explained that as per the records within the Respondent's office, there is a health facility known as Mutuini Hospital on the said parcel with a boundary.

12. In cross-examination, DW1 said that **LR No. Dagoretti/Mutuini/ 486** is surveyed though she could not recall its size, and that it has a block number but registration to Mutuini Hospital has not been done. She confirmed that the Hospital was constructed in 2020 following approval vide minutes which the Respondent would table in court. Further, that the said hospital and parking has occupied 70% of the whole ground and development of a new extension is ongoing.

13. She averred that the Respondent has initiated correspondence to other government agencies in respect to the Petitioner's claim and has communicated with the National Land Commission and Director of Survey to issue it with a sealed RIM to enable registration or reservation for the hospital and that the same has been given without any subdivision indicated on the plot.

14. She noted that D. Exhibit 2 emanated from the Director of Survey and that it indicates that Mutuini hospital sits along

parcel numbers 447-485. While referred to the top right of D. Exhibit 2, she stated that **plot 452** is clearly set aside for a dispensary while **plot 486** is earmarked as a public utility plot and is set aside for a market. Further, that a Planner can plan but the Respondent can change the use of a specified area. She insisted that in the Dagorretti area, most of the land uses have not been developed as per their intended use.

15. She did not have a PDP for plot 486 though there was an attempt to subdivide it as per P. Exhibit 4, but it is not accompanied by a gazette notice. DW1 also noted that for all public land, it is NLC which should be requested to compensate a land owner in cases of compulsory acquisition.

Submissions

16. The Petitioner relied on the case of **Republic v City Council of Nairobi & 3 Others Ex Parte Wachira Nderitu Ngugi & Co. Advocates (2016) eKLR** to submit that since she had complied with the conditions in her letter of allotment dated 2nd September 1993, she has an enforceable interest in the

suit plot. Further, that according to the D. Exhibit 2, a hospital/Dispensary had a reserved plot being **plot no. 452** while it has now been constructed on **plot no. 486** which is earmarked for her **Plot "A"**.

17. She submitted that the Respondent acted with impunity, disregarded her property rights, and diverted Mutuini health dispensary to her allocated plot.

18. She reiterated that failure to issue ownership documents to her after she had been duly allocated the suit plot is in breach of her right to legitimate expectation. Further, that the Respondent took possession of her plot without undertaking the compulsory acquisition process and compensating her, which conduct is in violation of Article 40 of the Constitution. She further submitted that State organs must respect constitutional rights when dealing with private property and

that they cannot arbitrarily deprive a citizen of property without following the procedure laid down in law.

19. To buttress her averments, she relied on the following decisions: **Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others (2012) eKLR** and **Kenya Airports Authority v Mitu-Bell Welfare Society (2016) eKLR**.

20. On its part, the Respondent submitted that the Petitioner did not dispense the burden of proof placed on her under Section 107 and 109 of the Evidence Act since she did not tender in evidence a formal written acceptance letter of the alleged letter of allotment dated 2nd September 1993. Further, that she admitted that there are no records of her alleged suit plot at the Land Registry since it has never been surveyed and conceded that she has never been issued with a Certificate of Lease and survey plans indicating the exact boundaries of the suit plot. It argued that a letter of

allotment is a mere intention to allocate land and that the same cannot transfer an interest in land unless the same is perfected in favour of the proposed allottee.

21. It also submitted that the map filed by the Petitioner was never certified as a true copy of the original and neither did it bear a stamp or acknowledgement by its maker for this court to appreciate its authenticity. Further, that the said map is a proposed part development plan for subdivision which has never been registered nor gazetted.

22. To buttress its arguments, it relied on the following decisions: **Torino Enterprises Limited v Attorney General (Petition 5(E006) OF 2022) [2023]KESC 79 (KLR) (22 September 2023((Judgement), Lilian Waithera Gachuhi v David Shikuku Mzee[2005] eKLR; Gathonu (As Administrator of the Estate of the Late Thumbi Kariuki)& 3 others v Registrar & 7 others (Civil Appeal E505 & e519 of 2020(consolidated)**

[2024] KECA 668(KLR) (14 June 2024)(Judgement) and Dyno Holdings Limited v National Land Commission & another [2018] eKLR.

Analysis and Determination

23. Upon consideration of the Petition, Response to Petition, testimony of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:

- **Who between the Petitioner and the Respondent owns unsurveyed commercial cum Residential Plot “A” Dagoretti/ Mutuini Nairobi.**
- **Whether the Respondent unprocedurally compulsorily acquired unsurveyed commercial cum Residential Plot “A” Dagoretti/ Mutuini Nairobi.**

24. The Petitioner exhibited a letter of allotment dated 2nd September 1993, for **unsurveyed commercial cum Residential Plot “A” Dagoretti/ Mutuini Nairobi** and averred that the Respondent has deliberately delayed to

process her Lease despite her compliance with all the conditions set out in the said Letter of Allotment.

25. On its part, the Respondent contended that the survey map for **Dagoretti/Mutuini** indicates that **Dagoretti/Mutuini/486** is a public utility parcel set aside for a dispensary and that Mutuini Health clinic has been developed thereon. Further, that since there is no evidence that the Petitioner perfected the alleged letter of allotment, the same cannot confer ownership rights upon her.

26. In response, the Petitioner contended that as per the survey map for **Dagoretti/Mutuini** (D. Exhibit 2), a hospital/dispensary had a reserved plot being plot **no. 452** while the Respondent had trespassed and constructed a dispensary on **plot no. 486**, which is earmarked for her **Plot "A"**, in disregard to her property rights under Article 40 of the Constitution and without following proper procedure on compulsory acquisition.

27. On perusal of the exhibits produced by the Petitioner, I note there is a Letter of Allotment dated the 2nd September, 1993 for UNS. COMMERCIAL CUM - RESIDENTIAL PLOT 'A' DAGORETTI/ MUTUINI NBI. There is no indication if the Petitioner accepted the Allotment and paid the required Stand Premium, Rent, Conveyancing fees, Registration fees, Stamp duty, Survey fees, which were indicated therein within the stipulated period. However, the Petitioner produced a receipt dated the 19th June, 1995 for Kshs.25,484 for the said UNS - COMMERCIAL PLOT 'A' DAGORETTI. The Petitioner furnished court with a sketch map/plan which was not authenticated nor dated.

28. The Petitioner also produced a letter dated the 31st August, 1995 addressed to the District Surveyor Nairobi whose subject is UNS. RESIDENTIAL PLOT 'A' - DAGORETTI/MUTUINI NAIROBI and DAGORETTI /MUTUINI/ 525. Further, there is a letter dated the 26th November, 2008 from the Provincial Surveyor addressed to

the Chief Mutuini where the author stated that he had received a request for survey from the Petitioner and that a survey team would visit Dagoretti/ Mutuini/486 for reconnaissance and picking. From this letter it is not clear at what point, the aforementioned unsurveyed plot 'A' had been converted to Dagoretti/ Mutuini/ 486, issued with a title and was hence rescheduled for reconnaissance and picking.

29. It is trite that for an Allottee of land to obtain a Certificate of Title to the said land, the said Allottee has to adhere to the terms set out in the Letter of Allotment within the designated period. Further, there has to be a Beacon Certificate, payment of the requisite fees, available PDP, processing of a Deed Plan, before the Lease can be processed. PW1 in her testimony confirmed that she did not have the acceptance letter to the allotment and further that the documents in respect to the suit plot were not available at the Land Registry. She further confirmed that the sketch map she produced in Court did not emanate from Nairobi City County

but she got it from the Ministry of Lands. This was ironical because earlier on, she had explained that her documents were not in the Lands Registry. DW1 insisted that the suit plot was public utility and had a Health facility thereon.

30. In the case of **Nelson Kazungu Chai & 9 Others vs Pwani University [2014] eKLR**, it was stated that:

“The above two sections clearly shows that land reserved for public purpose cannot be allocated to individuals. This position has been reinstated at Article 62 (1) (b) of the Constitution. The Article has defined “public land” to include land lawfully held, used or occupied by any State organ. Such land cannot be disposed of or otherwise used except in terms of an Act of Parliament.

31. In **James Joram Nyaga & another v Attorney General & another [2019] KECA 608 (KLR)**, it was held as follows:

‘The question of whether the Commissioner of Lands could legally alienate un-alienated public land has been considered in the past by the Supreme Court in an advisory opinion - In

the Matter of the National Land Commission (2015) eKLR in which the Court remarked as follows, “Section 3 of the Government Lands Act (GLA) conferred powers on the President to make grants of freehold or leasehold of un-alienated Government land. Section 7 prohibited the Commissioner of Lands from exercising the powers of the President under Section 3, subject to certain exceptions; though the President could (and did) delegate his powers to the Commissioner. Procedures were laid out, to guide the allocation of Government land; but those were not duly followed, subsequently. The Government treated public land as its “private property”, and the public-interest element in administration and allocation of public land was negated. The Commissioner of Lands was making allocations of land by direct grant, routinely exceeding his authority. (Such excesses of power are well documented in the Ndungu Report). It follows that the onus was on the appellants to satisfy court that the Commissioner of Lands had requisite powers to grant the suit property to them. The appellants were indeed required to do

more in proving that the legal and right procedure was followed in alienating the suit property to them.....We therefore hold that the suit land having been acquired for public purpose, that is construction of road, is held in trust of the public and could not have been allocated to the Applicants who are private individuals for their private use.’

32. Further, in **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)** the Supreme Court stated thus:

“58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr Joseph NK Arap Ng’ok v Justice Moiyo Ole Keiyua & 4 others CA 60/1997 [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

“It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all” emphasis mine

33. From the facts as presented by the Petitioner while associating myself with the decisions cited and applying them to the circumstances at hand, I find that the Petitioner did not accept the alleged allotment and fulfil the terms set out in the said letter of allotment within the requisite time. Further, since the letter of allotment indicated the land was unsurveyed, she cannot turn around and claim LR No. Dagoretti/ Mutuini/ 486 as the suit plot, yet she did not even produce a Beacon Certificate, a proper PDP and Deed Plan. I opine that since this land was still unsurveyed, the burden of proof was upon the Petitioner to demonstrate with documentation on how the suit plot, was converted to LR No. Dagoretti/ Mutuini/ 486, which she failed to discharge.

34. I note both parties admit that there is a health facility on the disputed plot which it has emerged is public. In my view, I find that the suit plot is indeed public land since it remained unsurveyed and hence was not available for allocation. I hence find that the Petitioner was not the owner of the unsurveyed plot 'A' Dagoretti/ Mutuini, as claimed. Further, since the disputed plot was still public land as it was unsurveyed and unregistered, I opine that the Respondent could not have compulsorily acquired it as claimed by the Petitioner, as it is only registered land that can be acquired through the said process.

35. In the foregoing, I find that the Petitioner has not proved her case on a balance of probability and will proceed to dismiss it but make no order as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
27TH DAY OF APRIL, 2026**

CHRISTINE OCHIENG

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JUDGE

In the presence of:

Wairimu for Nguringa for Applicant

Ojonga for Respondent

Court Assistant: Joan

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