



**Mugo v Attorney General & 2 others (Petition 2 of 2018)
[2019] KEELC 5110 (KLR) (11 October 2019) (Judgment)**

Neutral citation: [2019] KEELC 5110 (KLR)

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

PETITION 2 OF 2018

EC CHERONO, J

OCTOBER 11, 2019

**IN THE MATTER OF ARTICLES 19, 22 23, 40 47
50 & 64 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE GOVERNMENT
LANDS ACT (REPEALED) & TRUST LAND ACT**

IN THE MATTER OF NATIONAL LAND ACT, 2012

IN THE MATTER OF NATIONAL LAND COMMISSION ACT

IN THE MATTER OF KENYA GAZETTE NOTICE NO. 6334

IN THE MATTER OF THE PURPORTED REVOCATION OF TITLE

BETWEEN

EDWARD MUGO PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

JUDGMENT

1. This is a judgment arising from the petition dated 14th June, 2018. In the petition the petitioner sought the following prayers:-

- (i) A declaration that land parcel No. Inoi/Kerugoya/250/275 had not been reserved for public purpose under the relevant provisions of the *Constitution*, the *Government Land Act* (now repealed and the *Trust Land Act*) and was therefore not illegally allocated to the petitioner.



- (ii) A declaration that the 1st respondent is by law not mandated to acquire the petitioner's private land and/or cancel the title thereof.
 - (iii) A declaration that the petitioner is entitled to the enjoyment right enshrined under Article 40 (1) of the Constitution and that the same has been violated by respondents.
 - (iv) A declaration that the 1st respondent purported revocation of the petitioner's title to all that parcel of land comprised of title number Inoi/Kerugoya/250/275 is unconstitutional, null and void.
 - (v) A declaration that the certificate of title to the petitioner in respect to the suit property is conclusive evidence of ownership and that the petitioner is the absolute and indefeasible owner of the suit property.
 - (vi) An order of certiorari do issue to bring into this Honourable Court for the purposes of being quashed, the 1st respondent Gazette Notice number 6334 dated 6th June 2001 purporting to revoke the petitioner's title to all that parcel of land comprised in title number Inoi/Kerugoya/250/275.
 - (vii) An order of injunction do issue against the respondents restraining them through themselves, their servants and/or agents whomsoever from alienating the petitioner's parcel of land comprised in title No. Inoi/Kerugoya/250/275 or in any manner interfering with petitioner's possession of the said premises.
 - (viii) An order of prohibition do issue to restrain the respondents by themselves, servants, agents or whomsoever from in any manner issuing any title and/or license in respect to the petitioner's land comprised in title number Inoi/Kerugoya/250/275.
 - (ix) an order of mandamus do issue to compel the respondents by themselves, servants, agents to delete any entry on the petitioner's certificate of title made as a consequence to or in furtherance to the Gazette Notice No. 6334 of all that parcel of land comprised in title Number Inoi/Kerugoya/250/275.
 - (x) Damages.
 - (xi) Costs of the petition.
2. The petition is supported by his affidavit sworn and numerous documents annexed thereto. The said petition was filed contemporaneously with a notice of motion dated the same date seeking a temporary injunction against the Defendants/Respondents from interfering with the Petitioner's/Applicant's quiet possession, use and enjoyment of the suit land parcel No. Inoi/Kerugoya/250/275.
 3. The 1st Respondent filed a Notice of Preliminary Objection dated 30th October, 2018 opposing this petition. The 2nd Respondent on the other hand filed a replying affidavit by one Joel Muriuki who is the County Secretary also sworn on 30.10.2018.

Petitioner's Case

4. The Petitioner stated that on or about 8th June 2011, the Land Registrar Kirinyaga on behalf of the Government published Gazette Notice No. 6334 and revoked the petitioner's title No. Inoi/Kerugoya/250/275. The petitioner further stated that by virtue of the said notice, the 1st Respondent purported that the petitioner's land had been reserved for public purposes and in particular Kerugoya



District Hospital under the relevant provisions of the (Constitution, the Government Land Act (Cap 280) and the Trust Land Act (Cap 288) a fact that was factually untrue and/or incorrect.

5. The petitioner argued that the 1st Respondent acted arbitrarily, capriciously and contrary to the law and Constitution by declaring that the petitioner's land had been allocated to him illegally and unconstitutionally without giving him a chance to defend himself. He stated that the action by the 1st respondent to revoke his title has violated his right to protection of the law, the right to life and a livelihood and the right to property and has subjected him to apprehension and anxiety which is tantamount to inhuman and degrading treatment.
6. He also stated that the unlawful revocation of his title has violated his right of legitimate notion and Constitutional value of the protection of the law and due process as envisaged under Section 77 (9) of the Constitution.

1st Respondents Case

7. The 1st Respondent filed a Notice of Preliminary Objection and raised the following grounds:-
 1. That the Applicant is guilty of laches.
 2. That the Notice of Motion and petition as drawn are fatally defective.
 3. That the revocation complained of was done in 2011 and the Gazette Notice No. 6334 by the Land Registrar was published in accordance with the law at the time.
 4. That under Section 65 (1) of the registration of Titles Act (now Repealed), A Registrar may exercise the following powers in addition to other powers conferred under this Act:
 - (i) He may, at any time, after such inquiry and notices, if any as he may consider proper, and upon production of such evidence as may be prescribed or as he may deem necessary, withdraw from the register by cancellation or otherwise any instrument or memorial which he is satisfied has determined or ceased or been discharged, or for any other reason no longer affects or relates to the land.
 5. That the Applicant has not demonstrated that the predecessor of the 2nd Respondent has jurisdiction or authority to allocate land belonging to the Ministry of Health.
 6. That the petitioner must strictly prove that the minutes marked EMM (a) are authentic.
 7. That the petitioner is forum shopping knowing that the suit is time barred as the matters herein are evidentiary in nature and ought to have been filed as a civil suit in accordance with the Limitation of Actions Act Cap 22 Laws of Kenya.

2nd Respondents Case

8. The second Respondent in its replying affidavit stated that the land parcel in dispute comprised on title number Inoi/Kerugoya/250/275 was initially a public land held by the defunct Kirinyaga County Council in trust of its residents. She stated that the said land was reserved for the expansion of Kerugoya District Hospital and the Ministry of Health had even constructed a Government Quarter known as MG/3 which was occupied by a servant of the Ministry of Health. The Second Respondent further stated that at the time of allocation of the suit land to the petitioner, the repealed Government Land Act and the repealed Local Government Act were in force and therefore the allocation of the said land should have been in accordance with the provisions of the said Acts of Parliament. The 2nd Respondent also contends that according to Section 9 of the Government Land Act the Commissioner of Land



could dispose of in a prescribed manner public land within township which was not required for public purpose. She also stated that Section II of the Government Act required the Commissioner of Lands to determine the upset price at which the lease of town plots will be sold before disposing of the same. The 2nd Respondent further contends that Section 12 of the Government Land Act required all leases of the town plot to be sold by auction unless the President ordered otherwise in any particular case. The 2nd Respondent also contend that the Notice of Sale and the condition of sale of town plots to be published in a Gazette not less than four weeks nor more than three months before the day of the sale through a public auction. It is also stated that Section 14 of the Government Land Act required the auctioneer to read the terms and conditions of the sale to all person bidding before the commencement of the sale. The plot would be sold to the highest bidder and the purchaser would pay one quarter of the purchase money and in default therefore the lease of the plot would be offered for sale immediately. The balance of the purchase price was required to be paid to the Commissioner at the Lands office within seven days from the date of the sale and thereafter the purchaser would be entitled to the lease of the property. It is also the 2nd Respondent's contention that pursuant to Section 144 (6) if the Local Government Act, the consent of the minister-in-charge of Local Government was required before disposal of any land belonging to local authority. She stated that the land in dispute having been reserved for a public purpose that is expansion of Kerugoya District Hospital was not available for allocation to the petitioner by the Commissioner of lands. In conclusion the 2nd Respondent argued that even if the land in dispute was not reserved for a public purpose and was available for allocation, it was allocated to the petitioner in a manner not envisaged by the law as due process of alienating Government Land within township as set out under the Act was not followed hence the allotment of the plot to the petitioner was not only irregular but unlawful. She set out the particulars of irregularities and/or illegalities thereunder. The petitioner further stated that even if the Court finds that the Land Registrar did not have the power to revoke the petitioner's title, this Honourable Court being seized with this matter has nonetheless the jurisdiction to investigate how the petitioner obtained the title to the land in dispute and if it finds the same was obtained illegally or unlawfully it has the power to order that the Land Registrar to revoke the said title.

3rd Respondents Case

9. The 3rd Respondent did not file any response to the petition or written submissions.

Issues for Determination

10. The issues for determination are fairly straight forward:
 - 1) Whether the petitioner has proved his claim on the required standard?
 - 2) Who is liable to pay costs?

Analysis and Determination

11. I have considered the evidence by the plaintiff and the submissions. I have also considered the applicable law. The petitioner in this case was allocated an un-surveyed plot No. 94A Kerugoya vide a letter dated 21st October, 1992. The said allotment was issued pursuant to a resolution by the Kirinyaga District Plot Allocation Committee meeting held at the District Commissioner's office on 24.03.1992. A copy of the minutes of the said Plot Allocation Committee was produced in evidence. Various correspondence were exchanged between the petitioner, the defunct Municipal Council of Kerugoya/ Kutus and the Ministry of Land and Housing.



12. On 19th May 1993, the petitioner was granted a lease for 99 years effective from 1st day of July 1992 and on the same day, he was also issued with a certificate of lease. Those documents which were produced in evidence confirm that the petitioner was duly allocated the suit land.
13. In a letter by the defunct Municipal Council of Kerugoya to the Land Registrar Kirinyaga dated 17.9.93, the said Council was confirming that the petitioner was indeed the proprietor of the suit plot and that they had even allowed him to charge the same to Kenya Commercial Bank, Kerugoya Branch.
14. The documents produced in evidence shows that the petitioner even made payments of Kshs. 2,000/= which was acknowledged by the said council.
15. On 16.8.92, the petitioner even submitted a building plan to the said Council which was also approved.
16. On 19th May 1993, the petitioner was issued a lease for 99 years from 1st July 1992 and on the same day, he was issued with a certificate of lease.
17. On or about 15th February 1994 the Ministry of Health, the Hon. Attorney General and the Commissioner of Lands sued the petitioner for orders of inter alia a declaration that the suit parcel of land was alienated as reserved for hospital expansion. The petitioner filed a defence and counterclaim but the suit did not see the light of the day as the plaintiffs withdrew the same with no order as to costs. On or about 8th June 2011, the 1st Respondent issued Gazette Notice No. 6334 revoking the Petitioner's title alleging that the same had been allocated to him illegally as the plot had been reserved for public use namely Kerugoya District Hospital.
18. It is also important to note that the law in this country jealously protects the sanctity of titles to land. Section 26 of the [Land Registration Act](#). No. 3 of 2012 provides as follows:-
 - 26 (1) The certificate issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:
 - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme".
19. Other than the allegations contained in the pleadings, the respondents did not call any single witness to prove that the petitioner's title was acquired illegally or through a corrupt scheme.
20. Before any order may be made in terms of Article 40 (6) of the [Constitution](#) as read with Section 26 (10) (a) of the [Land Registration Act](#) No. 3 of 2012, that the title to land was acquired by fraud, misrepresentation and/or illegally and that the same does not deserve the protection by the [Constitution](#), the particulars of fraud misrepresentation and/or illegally must be pleaded and proved to the required standard.
21. The Respondents had initially filed a civil suit but did not even plead or particularized any issues of fraud, misrepresentation or illegality. That suit was to be withdrawn later. That suit in my view was the right forum for the respondents to articulate any issues of fraud or illegality in the acquisition of the title to the suit property by the petitioner. The respondents have not even raised the same by way of a counter petition.



22. In the case of *Kuria Greens Ltd v Registrar Of Titles & Another* [2011] eKLR, the Court held that without either compulsorily acquiring the suit property accompanied by full compensation to the petitioner or filing a suit challenging the petitioner's title, the respondent's actions of revoking the title was unlawful and an affront to private proprietary rights.
23. In a similar decision in another case of *Satima Enterprises Ltd v Registrar of Titles and 2 Others* [2012] eKLR, the Court held that the Registrar of titles had no authority under the Registration of Titles Act to revoke a title by way of a Gazette Notice and that such revocation was in breach of Article 40 and 41(1) of the *Constitution* since the petitioner was not given a hearing to contest the allegations subject of the revocation.
24. Again in the case of *Eunice Grace Njambi Kamau & another v Attorney General & 5 others* [2013] eKLR, the Court held that it was incumbent upon the respondent to demonstrate and establish the acts by the petitioner that would constitute illegality in the acquisition of the property.
25. I agree with the decisions by the learned Judges in the aforesaid cases. Before I conclude my analysis, I wish to recite the observation by the Court in *Adan Abdirahaman Hasaan & 2 Others v the Registrar of Titles & 2 others* [2013] eKLR where it was held:

“Indeed it was the respondents duty to place before the court evidence showing the public purpose that the suit property was reserved for to warrant the revocation of the petitioner's title by the respondents. In the absence of any response by the respondents, the court cannot make a determination on whether the property was ever reserved for public purpose and consequently, the title should be left to stand as it is”

26. This is the situation that befalls the present petition before me.
27. The respondents have not placed any material before me indicating that the suit property had actually been reserved for public use. I find and hold that the petitioner's title should be left to stand as it is.
28. In the result and arising from findings in the determination of this petition, I hereby make the following consequential orders:-
- 1) A declaration is hereby made that Gazette Notice No. 6334 dated 6th June 2001 purporting to revoke the petitioner's title to the suit property comprised in title number Inoi/Kerugoya/250/275 is contrary to Articles 40 and 47 of the *Constitution* and is therefore null and void.
 - 2) The Registrar of titles is hereby directed to rescind and reverse the revocation of certificate of title to LR No. Inoi/Kerugoya/250/275 as published in Gazette Notice No. 6334 dated 6th June, 2001.
 - 3) An order of permanent injunction be and is hereby issued restraining the respondents by themselves, their servants, agents and/or employees from alienating the petitioner's parcel of land comprised in title No. Inoi/Kerugoya/250/275 or in any manner interfering with the petitioner's possession of the said premises.
 - 4) The costs of this petition to be borne by the Respondents jointly and severally.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 11TH DAY OF OCTOBER, 2019.

E. C. CHERONO



ELC JUDGE

11TH OCTOBER, 2019

In the presence of:-

- 1) M/S Waweru holding brief to Wangechi Munene for Petitioner
- 2) Respondents/Advocate - absent

