



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L PETITION NO. 5 OF 2015**

**IN THE MATTER OF A PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION  
OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS &  
FREEDOMS OF THE PETITIONERS UNDER ARTICLES 27, 40 AND 47 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ACTIONS OF THE RESPONDENTS IN ILLEGALLY AND  
ARBITRARILY ISSUING A CERTIFICATE OF LEASE IN THE NAME OF MUSA  
KIPKURERE KIBUSIA TO PROPERLTY TITLE NO. KABARNET/MUNICIPALITY/174  
WITHOUT DUE PROCESS**

**BETWEEN**

**VERONICAH KIPSANG.....1<sup>ST</sup> PETITIONER**

**CHRISTINE T. KANDIE.....2<sup>ND</sup> PETITIONER**

**PAULINE T. KIPSOI.....3<sup>RD</sup> PETITIONER**

**ELIMA P. ARGUT.....4<sup>TH</sup> PETITIONER**

**PRISCA KIPCHILAT.....5<sup>TH</sup> PETITIONER**

**REGINA TOMNO.....6<sup>TH</sup> PETITIONER**

**RAEL CHEPTOO.....7<sup>TH</sup> PETITIONER**

**JANE KANDIE.....8<sup>TH</sup> PETITIONER**

**RUTH CHESANG.....9<sup>TH</sup> PETITIONER**

**JULIA KANGOGO (*SUING FOR AND ON BEHALF OF THEMSELVES AND*)**

**KABARNET PRECIOUS WOMEN GROUP.....10<sup>TH</sup> PETITIONER**

**VERSUS**

**THE LAND REGISTRAR, KABARNET.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF BARING.....1<sup>ST</sup> INTERESTED PARTY**

**LUKA CHEPTORUS CHESIRE.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

The petitioners herein have come to court claiming that they were duly allocated that entire parcel of land known as L. R. No. **KABARNET/MUNICIPALITY/175** (hereafter referred to as the suit property) after duly applying for the same.

That consequently, a letter of allotment was issued to the petitioners by the Commissioner of Lands (the 2<sup>nd</sup> respondent) which required that the petitioners make a payment of Kshs.25,990 being stand premium among other charges.

That the said property was allocated to the petitioners with vacant possession for development and was subject to the special conditions which required the petitioners to pay rates and outgoing that would be imposed upon the property by the Government and Local Authority.

That the Petitioners have faithfully and promptly paid to the Government and the Local Authority the requisite charges or levies and is up to-date.

That the petitioners sought to have the same registered to their name under the now repealed Registered Land Act, Chapter 300 of the Laws of Kenya after utilizing the same for some time.

That the Petitioners have, on conducting a search at the Lands Registry discovered documents that purport to show that the same had now been registered in the name of the 2<sup>nd</sup> Interested Party.

That the petitioners are not aware of any breach of the special conditions entitling the respondents to revoke their allocation and they have never been given any notice of cancellation or revocation of the letter of allotment.

That the purported registration of the suit property in the names of the 2<sup>nd</sup> Interested Party was arbitrary and denied the petitioners fair administrative practices as guaranteed by the Constitution of Kenya.

That the said actions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are illegal and unlawful and meant to deny petitioners a right to a fair process and the right to own and enjoy private property as guaranteed by the Constitution of Kenya, 2010.

That it is in the public interest and for ends of justice to him met for this application to be heard on priority basis.

**VIOLATION OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS AND FREEDOMS**

1. To the extent that the respondents have arbitrarily issued a certificate of lease to the 2<sup>nd</sup>

Interested Party herein without giving any notice of cancellation or revocation of his letter of allotment to the property the following provisions of the Constitution have been violated.

(i) Article 47 of the Constitution that guarantees the right of equality and freedom from discrimination.

(ii) Article 47 of the Constitution that guarantees the right to a fair administrative action by public bodies so that any decision adversely affecting an individual is supported by written reasons for the action.

(2) To the extent that the respondents have declined to reverse the arbitrary action of issuing a certificate of lease to the Interested Party thereby denying the petitioner a right over the property, the following provisions of the Constitution have been violated.

(i) Article 40 (1)(a)(b) and 3 of the Constitution that guarantees the protection of right to property.

The petitioners pray for:

1. A declaration that the decision of the respondents to issue a Certificate of Lease in the name of the 2<sup>nd</sup> Interested Party over L.R. NO. KABARNET/MUNICIPALITY/175 was illegal, arbitrary and discriminatory and contravened the petitioners' freedoms and rights to property and denied the petitioner the right to fair administrative practices.

2. A writ of certiorari directed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to remove into this Honourable Court the register of the lease and to quash or cancel any entry thereon of the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents purporting to register the name of the 2<sup>nd</sup> Interested Party as owner of L. R. KABARNET/MUNICIPALITY/175.

3. An order restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents by themselves or by any servants or agents from howsoever preventing the petitioners from accessing or entering upon or exiting from the property to wit L. R. NO. KABARNET/MUNICIPALITY/175.

4. An order for payment of damages for violation of the petitioners' fundamental constitutional rights.

The petition is supported by the affidavit of Veronicah Kipsang who states that she is the Chairlady of Kabarnet Precious Women Group.

That she is an adult female of sound mind, and the Chairlady of Kabarnet Precious Women Group and she has the authority of the other Petitioners herein to swear this affidavit on their behalf, hence competent to swear this Affidavit.

That the Petitioners herein are members of Kabarnet Precious Women Group which is a duly registered by the Department of Social Services and the allottee in possession of all that Plot No. 175 Kabarnet Municipality now known as KABARNET/MUNICIPALITY/175, (the suit property) situated in Kabarnet Township having duly applied for the same and thereafter being issued with a letter of allotment dated 1<sup>st</sup> November 1996.

That they had made an application to the Municipal Council of Kabarnet on 5<sup>th</sup> May, 1994 requesting that they be allocated a Plot and the Planning Markets, Works and Housing Committee recommended by Minutes dated 15<sup>th</sup> July, 1994 that they be allocated a commercial plot.

That by a letter dated 11<sup>th</sup> December 1995, the Town Clerk of Municipal Council of Kabarnet wrote to the Commissioner of Lands notifying him that some individuals had directly made applications for plots to the Commissioner of Lands without involving the Council and advised him only to consider those that

had been approved by the Council.

That by a letter dated 5<sup>th</sup> January 1996, the District Surveyor wrote to the Commissioner of Lands and the Director of Physical Planning recommending and forwarding PDP No. R.B 328/95/45 and cancelling an earlier PDP R.B 328/9/37 prepared by himself and which had been earlier forwarded vide a letter dated 28<sup>th</sup> November 1995.

That pursuant to the foregoing, the Commissioner of Lands issued them with an allotment letter addressed to them by which they were required to tender their acceptance and a bankers cheque for the amount shown thereon within 30 days and they duly complied.

That by the letter of allotment, they were required to pay stand premium and other charges which they promptly did and they were given vacant possession for purposes of carrying out development subject to meeting special conditions such as payment of rates and outgoings that would be imposed upon the property by the Government and Local Authority.

That they were shown the plot and the District Surveyor placed beacons on the plot after which they were issued with a beacon certificate.

That they have at all times paid rent and rates due to the Municipal Council of Kabarnet as confirmed by the letter dated 18<sup>th</sup> July 2006 and addressed to the Commissioner of Lands.

That they visited the Commissioner of Lands office and were surprised to be informed that the plot now belonged to someone else, the 2<sup>nd</sup> Interested Party having allegedly been allocated the same vide a letter of allotment purportedly dated 18<sup>th</sup> May, 1995 and a Certificate of Lease purportedly issued to him on 14<sup>th</sup> May 1998.

That she is advised by my Advocates, Messrs Geoffrey Otieno & Company Advocates which advise she verily believe to be true that the Respondents did not conform with the requirements of the law relating to allocation of plots.

That in light of the confirmation of ownership as per the records by the Town Clerk by the letters dated 18<sup>th</sup> July 2006 and by the 1<sup>st</sup> Interested Party vide its letter dated 3<sup>rd</sup> February 2014, it is rather apparent that the issuance of a certificate of lease to the 2<sup>nd</sup> Interested Party was in any event arbitrary and therefore illegal and null and void.

That it is therefore clear that the Respondents either on their own or with the aid of other persons unknown to us engaged in a fraudulent transaction with the intention of arbitrarily depriving her of the suit property.

That she is advised by our Advocates on record, Messrs. Geoffrey Otieno & Company, which advise she verily believe to be true, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have no power or authority to revoke the Petitioners' allotment letter of allotment in flagrant violation of the Petitioner's constitutional right to own property.

That she is also advised by our Advocates aforesaid that the purported issuance of a certificate of lease to the 2<sup>nd</sup> Interested Party over my property was arbitrary, illegal, null and void for the reasons enumerated hereunder:

(a) That no letter of allotment was ever issued to the 2<sup>nd</sup> Interested Party with the approval of the Municipal Council of Kabarnet as by law required.

(b) The 2<sup>nd</sup> Interested Party has never paid rent or rates over the subject plot and all the dues arising therefrom were paid by ourselves.

(c) The Part Development Plan purported to be relied upon in the process of registration by the Respondents had been cancelled.

That it is also therefore apparent that the registration of the 2<sup>nd</sup> Interested Party the Respondents did not take into account the ownership status of the property and is obviously irregular illegal and as such null and void.

That in view of the foregoing, it is also apparent that the 2<sup>nd</sup> Interested Party could dispose of the subject parcel thereby rendering this suit nugatory if the Court does not intervene and make the orders sought herein pending the determination of this matter.

That she verily believes based on the foregoing averments that there is an urgent need for this Court to move with speed as a custodian of the majesty of the Constitution and uphold the principle of Constitutionalism and the rule of law by halting any further blatant disregard of the law by the Respondents.

That it is the interest of justice that this Honourable Court should grant the prayers sought until this matter is heard and determined in totality.

The 2<sup>nd</sup> interested party filed a replying affidavit stating:

That he is an adult of sound mind and disposition and the 2<sup>nd</sup> interested party herein hence competent to swear this affidavit.

That he has read the petitioners' application together with its supporting affidavit and the petition therein both dated the 16<sup>th</sup> March, 2015 and filed in court on the 18<sup>th</sup> March, 2015 and have the same explained to him by my advocates on record and wish to respond in opposition to the same as follows.

That at the outset, it is clear that the Petition and Application as filed by the petitioners is frivolous vexatious and an abuse of this Honourable Court's process.

That further to the foregoing, he is advised by my advocates on record M/S ODHIAMBO & ODHIAMBO ADVOCATES, advise which he verily believe to be true that the petition as filed herein is res-judicata as the issues raised herein were conclusively dealt with in NAKURU CMCC 2862/19198 LUKA C. CHESIRE VS CHRISTINE T. KANDIE & 8 OTHERS and the court had competent jurisdiction.

That sometime in the year 1995, he applied to the Commissioner of Lands to allocate to him the suit property.

That the then Commissioner of Lands upon receiving his application, wrote to various departments to confirm the position of the suit property and the same was confirmed to be vacant as per the letters from the District Lands Officer and the District Commissioner.

That subsequently, the process of allocation was begun by the respective authority and the approval was obtained from the Minister and a letter of allotment was issued thereafter.

That on the 22<sup>nd</sup> August 1996, the then Commissioner of Lands duly issued a letter of allotment in his name in respect of title No UNS. COMMERCIAL PLOT C KABARNET MUNICIPALITY (the suit property herein).

That upon receiving the letter of allotment, he duly paid the sums required an amount of Kshs.12,700 where upon he was issued with a certificate of lease from the government of Kenya.

That at the time of application of the allotment, they were three people namely MUSA K. KIBUSIA,

EVANS KIPROP and himself, hence the subdivision of the area into three portions as marked in the plan namely A, B and C.

That after they received their allotment letters, EVANS KIPROP surrendered his plot No. B to himself and MUSA to develop hence the same now was shared equally between them.

That the original plot No. C and part of B now were registered under one title which is now the present title No. KABARNET /MUNICIPALITY/175 (the suit property).

That sometime in October 1998, when he was making preparations on developing the land he discovered that some individuals (the petitioners herein) had encroached into his property (the suit parcel) and fenced it off.

That he conducted some investigations and he was informed that the trespassers (now the petitioners) had also been given an allotment letter to the said parcel of land.

That however, the allotment letter was issued to the Petitioners much later after his papers had been approved and he had already been issued with a title to the suit property.

That he tried to have the trespassers (now petitioners) to vacate his suit property but failed and this prompted him to institute a suit to have them permanently barred from encroaching on his land the suit property herein.

That the trespassers (now petitioners) entered appearance and filed their replying affidavit to their application together with a defence and counter claim, in opposition of their suit.

That the suit went to full hearing and the Nakuru Chief Magistrate who had competent jurisdiction to handle the matter held that he was the legal proprietor of the parcel of land (the suit property herein) and further ordered that the defendants now the petitioners herein be permanently restrained from in any way interfering with suit property.

That however, the defendants now (Petitioners) being dissatisfied with the decision of the Chief Magistrate preferred an appeal to the High Court vide a memorandum of appeal dated 2<sup>nd</sup> October, 2000.

That however, the appellants now petitioners failed to prosecute their appeal and his advocates on record M/S ODHIAMBO & ODHIAMBO ADVOCATES applied for the appeal to be dismissed for want of prosecution.

That indeed the appeal was dismissed for want of prosecution on the 10<sup>th</sup> February, 2009.

That from the foregoing, it therefore evident that the petitioners herein came to this Honourable Court with tainted hands guilty of material non-disclosure with the sole aim of abusing the court process.

That also the cause of action and the whole petition as filed by the petitioners herein is res-Judicata as it is evident that the prayers in the Petition are a copy paste of their prayers in their counter claim that was filed in court on the 15<sup>th</sup> December, 1998.

That the petitioners herein have brought in the Land Registrar Kabarnet, a defunct Commissioner of Lands Office and the Attorney General to mischievously obscure real issues in the petition herein and to try and beat the issue of res-judicata since these three parties were not present in the earlier suits.

That his averments in paragraph 24 supra can be buttressed by the fact that the petitioners have miserably failed to show any reasonable cause of action against all the respondents.

That the only cause of action that the Petitioners have is clearly against him the 2<sup>nd</sup> interested party,

which cause of action was fully heard and determined by a court of competent jurisdiction and the same cannot be opened again save on an appeal.

That further, if the Petitioners herein really felt aggrieved by the decision of the Chief Magistrate, then they should have applied to the High Court for their appeal to be reinstated for it to be heard on merits rather than coming with a fresh suit under a constitutional petition which if sustained by this Honourable court will be contrary to public policy.

That from the foregoing, it is evident that the respondents herein as state actors have not violated any rights of the petitioners as claimed in the petition as it is evident that a court of competent jurisdiction in NAKURU CMCC 2862/1998 was the body which held that the suit property was legally mine and also permanently restrained the petitioners herein from in any way interfering with it.

That from the foregoing, it is evident that this suit has been brought to this honourable court mala fide, full of material non-disclosure and also being res-judicata and should be dismissed with costs.

Fred O. Nadwa, the Court Land Registrar filed a replying affidavit stating that land parcel No. Kabarnet/Municipality/175 was allocated to the 2<sup>nd</sup> Interested Party by the Municipal Council of Kabarnet and that the Commissioner of Lands subsequently issued a certificate of lease dated 14.5.1998 and therefore, the 2<sup>nd</sup> Interested Party is the rightful owner.

The petitioners submit that the issuance of the Certificate of Lease to the 2<sup>nd</sup> Interested Party was arbitrary, irregular and therefore, infringed on his right to property having been issued with a letter of allotment dated 13.11.1996 and having complied with the set requirements.

The petitioners further argue that Section 26 of the Land Registered Act No. 3 of 2012 is applicable as the Certificate of Lease was issued to the 2<sup>nd</sup> Interested Party without approval of the 1<sup>st</sup> Interested Party. Leasehold are to be issued with the involvement of Municipal Councils which are now different and that their function have now been taken over by County Governments.

The 1<sup>st</sup> – 3<sup>rd</sup> respondents argue that the petition has no merit and should be dismissed with costs as the petitioners have no title to the suit property and therefore, their right to property has not been infringed.

Moreover, that title to land property can only come into existence after issuance of letter of allotment meeting the conditions stated in such letter and actual issuance thereafter of the title documents pursuant to provision in the Act under which the property is held.

The respondents ultimately submit that in the absence of the title document thus, Certificate of Lease, the petition lacks standing to institute or prosecute the petition.

## **DETERMINATION**

The gravamen of the petitioner's submissions is that the issuance of a certificate of lease to the 2<sup>nd</sup> Interested Party was arbitrary, irregular and therefore, infringed on his rights to property, having been issued with a letter of allotment dated 13.11.1996 and having complied with the set requirements. The petitioner argues that he is the owner of the property.

The petitioner further argues that the certificate of lease was issued without approval of the 1<sup>st</sup> Interested Party and therefore, the same was issued illegally, unprocedurally and through a corrupt scheme. Moreover, they submit that the certificate of lease was issued contrary to the provision of rule of law and contrary to Articles 40 and 47 of the Constitution of Kenya, 2010 and therefore, the same is unconstitutional and unlawful.

Last but not least, the petitioner submits that the actions of the 2<sup>nd</sup> respondent goes against the spirit of good governance as set out in the constitution of Kenya.

The 1<sup>st</sup> to 3<sup>rd</sup> respondents argue that in absence of a certificate of lease, the petitioner lacks the standing to institute or prosecute the petition. Secondly, that the petition is an abuse of court process as they should have filed a civil suit.

The Interested party submits that:

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Having considered the petition, supporting affidavit, replying affidavits, I do find that the first issue to be considered is whether the petition is res-judicata.

The petitioners are 10 in number, petitioning for themselves and Kabarnet Precious Women Group. The 1<sup>st</sup> to 3<sup>rd</sup> respondents are state organs or agents of State organs. The 1<sup>st</sup> Interested Party is the County Government of Baringo whilst the 2<sup>nd</sup> Interested Party is the title holder to the property. The Petitioners' claim is basically that the act of issuing a certificate of lease to the 2<sup>nd</sup> Interested Party violated their rights to property as enshrined in Article 40 of the Constitution of Kenya, 2010 and the fact that the petitioners had an allotment letter indicates that the issuance of title to the 2<sup>nd</sup> Interested Party violated Article 47 of the Constitution that provides for fair administration of justice.

The petitioners seek a declaration that:

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The respondent in his replying affidavit state that he instituted Civil Suit No. 2862 of 1998 in Nakuru CMCC. The petitioners entered appearance and filed their replying affidavit with their defences and counterclaim. The suit went to full hearing and the Nakuru Chief Magistrate who had jurisdiction to handle the matter held that the 2<sup>nd</sup> Interested Party was the legal owner of the plot and ordered that the defendants be restrained from interfering with the property. The petitioners filed an appeal to the High Court but failed to prosecute the appeal and the same was dismissed for want of prosecution.

The legal principle of res-judicata is universal and applies to civil suits and petitions both vertically and horizontally. This if the subject matter has been determined by a court of competent jurisdiction between the same parties on the same issues than it is invited that the court determining the matter was a Lower Court or Superior Court or that a court dealing with a constitutional petition or a moral civil suit.

The principle of res-judicata is better espoused by section 7 of the Civil Procedure Act which provides

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Is the principle of res-judicata applicable in constitution matters? I do say yes. The principle of res-judicata is intended to bring an end to litigation. It is trite law that res-judicata applies to a matter that has been finally determined by a court of competent jurisdiction.

I have perused the plaint in Nakuru CMCC Civil Suit No. 2862 of 1998 and do find that the 10 petitioners were the defendants and the 2<sup>nd</sup> Interested Party was the plaintiff. The subject matter Kabarnet Municipality/175 and the dispute was on ownership. I have also perused the defence and counterclaim and do find that the issues are the same, thus ownership of the disputed parcel of land.

The Chief Magistrate's Court, Nakuru made a determination and the issue of recurring jurisdiction was not raised. I do find that failure to raise the issue of jurisdiction before the Chief Magistrate's Court in Nakuru, the Petitioners are estopped from claiming that the Chief Magistrate had no jurisdiction.

This matter having been determined by the Chief Magistrate, Nakuru Court be re-opened even by way of a constitutional petition. The only note the petitioners can take is to institute an appeal.

In *E.T. Vs Attorney General [2005] E.A. 83, 89*, it was held:

.....

This court concludes that the dispute revolving on the suit land has been resolved by a court of competent jurisdiction between same parties and the addition of the 1<sup>st</sup> to 3<sup>rd</sup> respondents is merely cosmetic and to mislead the court that there is a new cause of action and that petitioners are different. The petition is otherwise an abuse of court process and is dismissed with costs.

**Dated and delivered at Eldoret this 26<sup>th</sup> day of January, 2018.**

**A. OMBWAYO**

**JUDGE**