



**REPUBLIC OF KENYA**

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

**ELC PETITION CASE NO.6 OF 2013**

**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 27, 40, 48 AND 50 AS READ TOGETHER WITH  
ARTICLES 19, 20, 21, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA AND SECTION  
19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**ARTHUR ATHANASIOUS MOODY AWORI .....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY DIRECTOR OF**

**HOUSING KISUMU.....2<sup>ND</sup> RESPONDENT**

**THE PERMANENT SECRETARY MINISTRY**

**OF HOUSING.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. **Arthur Athanasius Moody Awori**, the Petitioner, vide the Petition dated 3<sup>rd</sup> April 2013, against **The Hon. Attorney General, The County Director of Housing Kisumu, The Permanent Secretary Ministry of Housing**, seeks for the following prayers:

“a) A DECLARATION THAT the Vacation notice issued by the Respondents are inconsistent with Article 40,48 and 50 of the Constitution of the Republic of Kenya in that the Petitioner herein is the registered leasehold owner of the property **KISUMU MUNICIPALITY /BLOCK 11/136** and the vacation notice was issued arbitrarily and without due regard to the process of the law and the Petitioner’s right of access to justice.

(b) A DECLARATION THAT the allegation by the Respondents and/or their agents and/or

servants or employees to the effect that the Petitioner's title to the property was illegally and fraudulently acquired is arbitrary, capricious and irregular, is unconstitutional and contravenes the Petitioner's fundamental Rights and Freedoms as recognized by the Constitution of Kenya and is therefore void, illegal, invalid and/or incapable of enforcement and /or of no legal effect.

(c) CONSEQUENTLY, AN ORDER prohibiting the Respondents whether by themselves, their officers, agents and/or servants or employees from evicting the Petitioner and/or from further interfering with the Petitioner's right of ownership and occupation of all that parcel of land known as **KISUMU MUNICIPALITY/BLOCK 11/136**.

(d) CONSEQUENTLY, AN ORDER prohibiting the Respondents whether by themselves, their officers, agents and/or servants or employees from restricting or otherwise limiting the Petitioner's peaceful enjoyment of and access to his property KISUMU MUNICIPALITY/BLOCK 11/136.

(e) A Declaration that the Respondents are in breach of the provisions of **Article 40** of the Constitution of Kenya by interfering with the Petitioner's rightful use of their land.

(f) A Declaration that the Respondents are perpetuating breaches of the law, the constitution of Kenya and carrying out and legalizing impunity contrary to the Constitution of Kenya and exhibiting arrogance and ignorance in performance of their public duties contrary to law.

(g) Damages for infringement of rights of the Petitioner to be paid by the Respondents jointly and severally."

The petitioner has listed the following grounds among others as the basis of the petition.

- That he has been the registered owner of **Kisumu Municipality/Block 11/136**, hereinafter referred to as the suit property, through the lease from the Government of Kenya for a term of 99 years from 1<sup>st</sup> July 1998.
- That he has expended substantial amount of money, time, labour and capital on the suit property.
- That the 2<sup>nd</sup> Respondent has issued the Petitioner with a one month notice to vacate this suit property and in default he be forcefully evicted.
- That the Petitioner has not been involved in the process leading to the issuance of eviction notice.
- That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have unlawfully, wrongfully and unconstitutionally cancelled the Petitioner's title to the suit property which act amounts to a breach of **Articles 40, 48 and 50** of the constitution.
- That there is real and present danger and the likelihood of loss or damage or risk and danger of loss of property and liberty which will adversely affect the Petitioner's peaceful enjoyment of his fundamental rights and freedoms.

2. The Petition is opposed by the Respondents through the replying affidavit sworn by Michael Ben Osewe, the Kisumu County Director of Housing, on the 26<sup>th</sup> June of 2013, in which he among others depones as follows:

- That on the suit property is a Government house **KSMUHOU/HG/97**, which is still in the Government buildings register.
- That the house was constructed in 1976 on the suit property and has never been boarded for sale.
- That the Petitioner has not surrendered and or validated the acquisition of the suit property as required by government Circular reference Number **CSHSF/EST/01/2/VOLL.11 (41)** and dated 24<sup>th</sup> January 2007. That as the house on the suit property belonged to the government, the Ministry of Housing asked the Petitioner to produce ownership documents for audit and verification but he failed to comply.

- That the house on the suit property has remained unused and or abandoned for more than ten (10) years while the Petitioner has declined to allow the Ministry make use of it yet while it was developed by the government for use by civil Servants in the County.
- That the alleged acquisition of the suit property by the Petitioner is invalid as the full value for the house has never been paid.

3. The Petition had been filed contemporaneously with a notice of motion dated 3<sup>rd</sup> April 2013 on the 18<sup>th</sup> April 2013. The application sought for conservatory orders in the nature of temporary and mandatory injunctions. The notice of motion has since been dealt with and the conservatory order in the nature of temporary injunction pending the hearing and determination of the petitioner granted vide the court's ruling of 29<sup>th</sup> January 2015.

4. The Petition came up for hearing on the 1<sup>st</sup> November 2016 when directions on filing of framed issues and written submissions were issued. The counsel for the Petitioner and Respondent filed submissions dated 10<sup>th</sup> January 2017 and 7<sup>th</sup> March 2017 respectively. The highlights of the submissions are as summarized herein below as follows;

#### **A. THE PETITIONER COUNSEL'S SUBMISSIONS**

The learned counsel submitted on three issues **as follows**;

##### **ISSUE 1**

Highlights of the submission are summarized herein below:

- That the petitioner acquired the suit property procedurally and paid the value of the development thereon assessed at Ksh, 400,000/= on the letter of allotment dated 1<sup>st</sup> July 1998, alongside other fees all totaling Ksh.447,732/=. That he also paid for loss of rent from 1<sup>st</sup> July 1998 to 31<sup>st</sup> December 1998 and receipt **No.E 153195** dated 10<sup>th</sup> November 1998 issued.
- That on completion of the payments, the Petitioner was issued with a certificate of lease under the Registered Land **Act Chapter 300 of Laws of Kenya** (Repealed). That **Section 25 (1)** of the Land Registration Act No.3 of 2012 provides that the rights of a registered owner to land acquired for valuable consideration is indefeasible except as provided for under the Act and that **Section 26(1)** provides that a certificate of title issued by the Land Registrar is prima facie evidence of absolute and indefeasible proprietorship of such land. The Learned counsel for the Petitioner also referred to **Section 27 and 28** of the said Act. The counsel also referred to the case of **James Njuguna & 3 Others –V- Municipal Council of Nakuru & Another** [2010] eKLR and submitted that a holder of a certificate of lease issued under the

Registered Land Act has his rights protected under the said Act unless evidence is put before the court to prove that the same was obtained through fraudulent means.

- That though the Respondents allege that the Petitioner acquired the suit land through fraudulent means, they failed to discharge the burden of proof placed on them under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya**. That as prima facie fraud has not been proved, the balance of convenience is in favour of the Petitioner and the court should find that the Petitioner acquired the suit property validly.

##### **ii) ISSUE 2:**

- That the Petitioner's right over the suit property are absolute and indefeasible pursuant to **Section 27 and 28 of the Registered**

**Land Act and Section 25(1) and 26(1) of Land Registration Act** and therefore protected under **Article 40 of the**

**Constitution.** The counsel referred to the case of **Joseph K. Nderitu & 23 Others –V- Attorney General & 2 Others** [2014] eKLR where the court held that the rights under **Article 40** of the

constitution do not extend to property said to have been acquired unlawfully. The court further stated that until the illegality in the acquisition is established, the registered owner is entitled to protection of their property as envisaged in the Constitution and have a right to commence action for conservatory and other appropriate reliefs. The learned counsel submitted that as the Respondents have not established the fraudulent acquisition allegations, their actions against the Petitioner amounts to an infringement of his rights under **Article 40 of the Constitution.**

- That the decision by the Respondents to issue a vacation notice was arrived at without giving the Petitioner an opportunity to be heard in contravention of **Article 48 and 50** of the constitution.

The counsel referred the court to the following two decisions; **Onyango –V- Attorney General** (1986-1989) E.A. 456, 459 and **Mbaki & Others –V- Macharia & Another** (2005) 2 EA 2006.

### iii) ISSUE 3

- That the court should issue the declarations as prayed in paragraph 26 (a) (b) (e) and (f) and orders in prayers (c) and (d).
- That damages prayed for in prayer (g) should be awarded as is backed under Article 23 (3) of the Constitution which provides for one of the remedies for violations of rights brought under Article 22. The learned counsel referred the court to the case of Daniel **Chacha Muriri -V- Attorney General** [2015] eKLR which cited the South African case of **Ntandazeli Jose –V- Minister of**

**Safety and Security** CC T 14/96 (1997) Z ACC 8. The learned counsel further referred to the case of **Mahat Kuno Roble & 4 Others V- Permanent Secretary Ministry of Defence &**

**Another** [2016] eKLR where a sum of Ksh.1,500,000/= had been awarded and submitted that an award of Ksh.2,000,000/= in this case would be sufficient for damages of violation of the Petitioner's rights under **Articles 40, 48 and 50 of the Constitution.**

### B. RESPONDENTS COUNSEL'S SUBMISSIONS;

- That on the suit property stands government house KSU/HOU/HG/97 and Petitioner has not validated the acquisition of the said land. That the acquisition is in contravention of the guidelines set out in Chapter 19 of the Government Financial Regulations and Circular No.8/58 dated 1<sup>st</sup> March 1958. That for a government house to be disposed off, a board of survey is formed to prepare an inspection report which is forwarded to the Ministry's Accounting officer with recommendations in Form F 058. That the Accounting officer then forwards Form F058 to the Principal Secretary Treasury for approval and it is only then the house is removed from the register of government houses. That the Controller and Audit general is then informed accordingly. That the Petitioner's acquisition of the suit property did not follow the set procedure and the house thereon is still a Government house and the Respondents were in order to ask the Petitioner for the documents listed in their letter dated 10<sup>th</sup> December 2012 for verification and audit purposes.

### ii) ISSUE 2

- That the Petitioner failed to submit the documents sought in the Respondents letter dated 10<sup>th</sup> December 2012 by 27<sup>th</sup> December 2012 and instead filed this petition and was granted

conservatory orders. The learned counsel submitted that the request for documents of ownership of the suit property does not amount to a violation of the Petitioner's constitutional rights.

- That the Petitioner cannot validate his acquisition of the suit property by filing this constitutional petitioner without demonstrating how his rights have been violated and therefore the orders sought should not be granted.
- That a certificate of lease acquired fraudulently and unlawfully cannot confer any rights of ownership on the Petitioner. The learned counsel referred the court to the court's ruling in **Kisumu**

**Martin Ogutu Odiyo –V- Principal Secretary Housing & 2 Others HC. ELC. Petition No.23 of 2013** where the Petition was struck out with costs on finding that the matter was about a dispute on possession of suit property and legality of the title documents held by the Petitioner.

- The counsel also referred to the case of **Susan Waithera Kariuki & 4 others –V- The Town Clerk, City Council of Nairobi & 2 others** [2011] eKLR and submitted that the Petition should be dismissed on public interest as the house on the suit property has remained unused and or abandoned for more than ten (10) years yet it was put up by the government for use by Civil Servants working in Kisumu County.
- The counsel also referred to the case of **Ethics & Anti – Corruption Commission –V- Njuguna Macharia** NBI HC ELC No. 310 of 2014 [2015] eKLR which cited the case of **Milankurman Shah & 2 others –V- County Council of Nairobi & Others** NBI HCCC No.1024 of 2005 where the court held that public rights takes precedence over private rights and that a title acquired through a process which was a violation of the Government Land Act (Repealed) did not confer absolute and indefeasible title land.

5. The following are the issues for the court's determinations

- a) Whether the Petitioner's registration as proprietor of **Kisumu Municipality/Block 11/136** was regularly, lawfully and procedurally done.
- b) If the answer to (a) above is in the affirmative, whether house labeled **KSU/HOU/HG/97** is situated on the said land, and if so, whether it was still a government house.
- c) Whether the Respondents letter to the Petitioner dated 10<sup>th</sup> December 2012 is a vacation notice amounts to a violation of the Petitioner's rights and fundamental freedoms.
- d) Whether the Petitioner is entitled to the reliefs sought.
- e) Who pays the costs.

6. The court has carefully considered the petition, the affidavit evidence, submissions by both counsel and come to the following determinations;

A) That though the Petitioner alleges in paragraph 10 and 14 of the petition that the Respondents had issued him with a one month notice to vacate the suit property or be forcefully evicted and that they had cancelled his title to the said land, there is no evidence adduced or availed to confirm the allegations. That the only documentary evidence availed to the court by the Petitioner is the letter dated 10<sup>th</sup> December 2012 annexed to his supporting affidavit which is reproduced herein below.

**“MINISTRY OF HOUSING”**

**County Housing office**

**P.O. BOX 3225-4000**

**KISUMU.**

**Date 10<sup>TH</sup> December 2012**

**Ref.**

**Block 11/136**

**RE: VERIFICATION AND AUDIT OWNERSHIP DOCUMENTS.**

**We delivered a letter at your residence in which you were required to avail ownership documents i.e.**

- 1. Letter**
- 2. Lease**
- 3. Certificate of lease**
- 4. Deed plan**
- 5. Evidence of validation of title by Permanent Secretary, Ministry of Housing.**

**By 30<sup>th</sup> November 2012 since the records indicates that the property you are occupying is still a government house. We have extended the period to 27<sup>th</sup> December 2012. After expiry of the notice, it will be assumed that you are illegally occupying a government property and the necessary recovery process will be initiated.**

**M.B. Osewe**

**Ag. County director of housing**

**Kisumu County**

**CC.**

**County Commissioner**

**District Commissioner**

**Ethics and Anti-Corruption Commission.**

**Transition Authority.**

**“**

There is nothing in the letter reproduced above that can be said to be a notice to vacate in one month or any other time frame. The letter does not indicate that the Respondents would forcefully evict the Petitioner after the expiry of one month without giving vacant possession of the suit property. The letter does also not contain any information or decision to cancel the Petitioner's title to the suit land. That accordingly, the court finds that the Petitioner has failed to discharge his duty to prove the allegations as required under **Section 107** of the Evidence Act Chapter 80 of Laws of Kenya.

B) That the import of the Respondents letter to the Petitioner dated 10<sup>th</sup> December 2012 was to require him to avail the documents listed therein by 27<sup>th</sup> December 2012, failure to which he would be taken to be illegally occupying a government property and the necessary recovery process would be initiated. The Respondents have through the replying affidavit sworn on 26<sup>th</sup> June 2013, and the

submissions by their counsel, given the background of that letter. That though the Petitioner held a certificate of lease over the suit property, a Government house, KSU/HOU/HG/97, was situated on that land and was still in the Register of Government houses for reasons that the Petitioner had not validated its acquisition as required under the Permanent Secretary, Ministry of Housing letter dated 24<sup>th</sup> January 2007. The letter provides as follows at paragraph (g) for Validation of Irregularity Alienated Government Houses;

**“G VALIDATION OF IRREGULARLY ALIENATED GOVERNMENT HOUSES**

**In respect of the irregularity alienated government houses, the following terms and conditions will apply:-**

**i) Where the house identified for sale has remained intact but the occupant is a:-**

**a) Non civil servant, the allottee compensates the Government for the loss of rent, the cost of the building and market value for the land at the time of alienation plus interest on loss of capital.**

**b) Civil servant who has been paying rent to the Government but the allocation was to a non-civil servant, the Government to repossess the house and sell to the occupying civil servant.**

**ii) Where the property has been alienated to a civil servant who has:-**

**a) A title deed and upto date in rent, the allottee to pay the sale price at the time of sale less the alienation cost paid.**

**b) Obtained a title deed to the house and stopped paying rent to the Government, the allottee pays the market value of the property, lost rent and interest thereon less alienation cost paid.**

**c) More than one allocation, conditions (a) or (b) apply to one property but pays market value for the other property (ies) as at the time of alienation plus loss of interest on market value.”**

C) That the Petitioner’s response to the Respondents contention was that he had paid the amount assessed in the letter of allotment dated 1<sup>st</sup> July 1998 as the value of the house under receipt No.E 153195 dated 10<sup>th</sup> November 1998. The court has perused the said letter of allotment and noted that after the space written “**stand premium**” is added the words “**value of House**” and a figure of Ksh.400,000/= given. That the receipt dated 10<sup>th</sup> November 1998 has a figure of Ksh.350,252/= inserted for “**cost of building**”. The Respondents position is that the house on the suit property has never been boarded for sale and was still in the register, a copy of which is annexed to the replying affidavit.

The Respondents’ counsel has in her submissions explained the process of boarding of Government building/houses and there is no evidence adduced to show that the house on the suit property went through the laid down procedure for boarding and approval before the Petitioner acquired the title to the suit land.

D) That in view of the finding in (C) above, the court can only conclude that the amount of Ks. 400,000/=, inserted after the item “**stand premium**” on the letter of allotment, was meant to be for **stand premium** and not the value of the house on the land. To hold otherwise would mean that nothing was charged and paid for the item “**stand premium**” under the said letter of allotment.

E) That the step taken by the Respondents to write to the Petitioner seeking that he avail copies of the documents listed or tabulated in the letter dated 10<sup>th</sup> December 2012 for verification and audit purposes cannot, under any method of interpretation, amount to an infringement or violation of the

Petitioner's right in view of the findings above that the Petitioner had not validated the acquisition of the government house by then. The Petitioner, like any other citizen had a civic duty to comply with such a request for the good of posterity.

F) That even though the Petitioner alleges that he had not been given a hearing, the request contained in the said letter was an second opportunity for him to present his case on the issue of the land but he declined to do so and instead filed this petition. The allegation that the Petitioner was denied an opportunity to be heard in contravention of **Articles 48 and 50 of** the Constitution cannot therefore have basis as there is no evidence of any adverse decision, either to evict him from the suit property or cancel his title, having been made by the time he came to court.

G) That the Petitioner annexed to his supporting affidavit the following documents;

i) Certificate of lease for Kisumu Municipality/Block 11/36 issued on 17<sup>th</sup> December 1998,

ii) Letter dated 16<sup>th</sup> December 1998 forwarding lease for the said land.

iii) Lease document dated 7<sup>th</sup> December 1998 and registered on 17<sup>th</sup> December 1998.

iv) Letter of allotment dated 1<sup>st</sup> July 1998 for the suit property.

v) Letter from 2<sup>nd</sup> Respondent dated 10<sup>th</sup> December 2012.

vi) Demand Notice form Municipal Council of Kisumu dated 5<sup>th</sup> April 2012.

vii) Letter from Commissioner of Lands to the Petitioner dated 15<sup>th</sup> December 1998 in respect of the suit property for Ksh.6,055/50 being contributions in lieu of rates.

viii) Letter from Commissioner of Land to the Petitioner dated 8<sup>th</sup> July 1997 for Ksh.112,500/= as contribution in lieu of rates for plot number L.R.22900 Kisumu Municipality.

ix) Receipt No.E153195 dated 10<sup>th</sup> November 1998 for kshs.447,732/= in the Petitioner's names for the suit property.

x) Receipt No.E 138521 dated 16<sup>th</sup> December 1998 for Ksh.320/= in the Petitioner's name for the suit property.

xi) Receipt No.096168 dated 17<sup>th</sup> December 1998 for Ksh.125/= in the petitioner's name for the suit property.

xii) Receipt No.E 153194 dated 10<sup>th</sup> November 1998 for Ksh.27,326/= in the Petitioner's name for unsurveyed Residential plot "B" Kisumu Municipality.

xiii) Standard Chartered transaction receipt for a local bank draft of Ksh.245,934/= payable to Commissioner of Lands.

That the documents in (e) (vi), (viii), (xii) and (xiii) do not appear to have any relationship to the suit property. The petitioner did not offer any explanation of their relevance to this suit.

H) That the petition dated 3<sup>rd</sup> April 2013, and filed on the 18<sup>th</sup> April 2013 is not signed as required at page 6 where the counsel's name is. It is also not signed at the place of " :**Drawn and filed by,**" at page 7. That even though the Respondents did not address the court on these omissions, and the Petitioner did not take any steps to cure the omissions, the court finds that the failure to sign the petition by counsel for the Petitioner means that there is no valid suit or petition before the court.

7. That flowing from the findings set out above, the court finds that the Petitioner has failed to prove any infringement and or violation of this constitutional right by the Respondents and the petition is hereby dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF JUNE 2017**

In presence of;

Petitioner Absent

Respondents Absent

Counsel Mr Orero for Hayanga for Petitioner

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

21/6/2017

21/6/2016

S.M. Kibunja judge

Oyugi court assistant

Parties absent

Mr. Orero for Hayanga for Petitioner/Applicant

Order: Judgment dated and delivered in open court in presence of Mr. Orero for Hayanga for Petitioner.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**