



**Ndambuki (Suing as an administrator of the Estate of the Late Gregory Ndambuki)  
& another v National Land Commission & 2 others (Environment & Land  
Petition E022 of 2023) [2024] KEELC 928 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 928 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E022 OF 2023  
LN MBUGUA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**MARIA NDUMBA NDAMBUKI (SUING AS AN ADMINISTRATOR OF THE  
ESTATE OF THE LATE GREGORY NDAMBUKI) ..... 1<sup>ST</sup> PETITIONER  
GREGORY NDAMBUKI (SUING AS AN ADMINISTRATOR OF THE LATE  
GREGORY NDAMBUKI) ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
ABBEY ABDINOOR OSMAN ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This suit was heard by way of Affidavit evidence and submissions, pursuant to orders given by consent of the parties on 19.9.2023.

**Petitioner's Case**

2. Vide a Petition dated 11.5.2023, the Petitioners claim that the Parcel Nairobi/Block 42/118 formerly L.R. No. 209/3271/71 (the suit property) was allotted to the deceased Gregory Ndambuki for a term lease of 54 years on 1.1.1950. Gregory died in year 1997, while the term of the lease was to expire on 1.1.2004.
3. The petitioners, who introduced themselves as administrators and beneficiaries of the estate of Gregory Ndambuki claim that after the lease had expired, they took steps towards renewing it, but in violation



- of their pre-emptive rights, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents irregularly, fraudulently and illegally allotted the suit property to the 3<sup>rd</sup> Respondent.
4. They also claim that their rights to property under Article 40, and their rights to fair administrative action under Articles 47 of *the Constitution* have been infringed.
  5. They seek the following orders;
    - a. This Honorable court be pleased to issue a declaratory order declaring that the 1<sup>st</sup> Respondent violated Petitioners' rights to property.
    - b. This Honorable court be pleased to issue a declaratory order directed at the 1<sup>st</sup> Respondent declaring that the 1<sup>st</sup> Respondent violated *the Constitution* in particular Articles 10(2),19(3) (b) and 47(2) of *the Constitution* of Kenya,2010.
    - c. This Honorable court be pleased to issue a declaration that the 3<sup>rd</sup> Respondent did not acquire good title to all that parcel of land known as Nairobi/Block 42/118 formerly LR No. 209/3271/71.
    - d. This Honorable court be pleased to issue an order for rectification of the land register by cancellation of the fraudulent registration of a lease and a certificate issued to the 3<sup>rd</sup> Respondent.
    - e. This Honourable court be pleased to issue an order of certiorari directed at the 1<sup>st</sup> Respondent and quash its decision dated 30.3.2023 with regard to the certificate of lease issued to the 1<sup>st</sup> Respondent.
    - f. This Honourable court be pleased to issue an order of mandamus directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and compel them to grant the Petitioners the pre-emptive rights over the suit property.
    - g. This Honourable court be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to jointly and severally pay the Petitioners damages for infringement of their constitutional right to property.
    - h. The Petitioners be awarded the cost of this suit; and
    - i. Interest on (g) and (h) and at court rates from the date of entry of judgement until payment.
  6. The petition is supported by the 2<sup>nd</sup> Petitioner's supporting affidavit sworn on 11.5.2023. She avers that her late father (Gregory Ndambuki) passed away in 1997 which was 7 years before the lease to the suit property expired. That following her father's death, her family commenced Succession Cause No. 2252 of 2004 over his estate, and though the case delayed in court, they actively followed up renewal of the lease to the suit parcel.
  7. She points out that in 2015, they instructed their then advocates to conduct a search over the property to confirm its status and applied to the succession court to be allowed to pay pending rates to the County of Nairobi in order to commence the renewal process.
  8. That on 8.5.2023, they received a notice from unknown persons indicating that the suit parcel had been allotted to another person thus they should vacate. The said Notice prompted them to conduct due diligence and discovered that the 1<sup>st</sup> Respondent had irregularly issued the 3<sup>rd</sup> Respondent with a title to the suit parcel.
  9. She avers that the 1<sup>st</sup> Respondent did not inform them of their pre - emptive rights to renew the lease and that it failed to carry out a physical verification of the land to establish that they were in occupation.



10. The Petitioners filed a supplementary affidavit sworn by the 2<sup>nd</sup> Petitioner on 16.10.2023, where she contends that they have been in occupation of the suit parcel and that they have been paying rates and all liabilities relating to the parcel. That in addition, they have applied for renewal of lease as per a letter by the 1<sup>st</sup> Respondent dated 18.9.2023 and approval by the Nairobi County Government dated 3.8.2023.

### **Case for the 1<sup>st</sup> Respondent**

11. The 1<sup>st</sup> Respondent filed 2 separate Replying Affidavits in response to the petition, both sworn by Brian Ikol, their Director, Legal affairs and Dispute resolution. In the 1<sup>st</sup> Affidavit filed on 5.10.2023, the deponent avers that the suit land was allocated to Ali Sher son of Noor Mohamed for a term of 54 years from 1.1.1950 to 1.1.2004. That the property was subject to several transactions and at entry No.10, one Ndambuki Muoki caused to be registered a caveat claiming a purchaser's interest though from available records, there is no evidence of such a purchase.
12. He points out that at entry No. 19, the property was vested in the said Ndambuki Muoki vide a court order in Civil Case No. 1712 of 1971.
13. That from available records, the lease of the suit parcel expired on 1.1.2004 and the land reverted to the government as unalienated government land, thus there is no evidence that the petitioners made any effort to apply for a renewal of the lease.
14. He avers that a look at the correspondence file indicates that on 11.1.2005, the 3<sup>rd</sup> Respondent applied to be allocated the suit parcel, of which the commissioner of lands approved the application on 14.6.2005.
15. That thereafter, a letter of allotment Ref No. 38929/27 was issued to the 3<sup>rd</sup> Respondent for a period of 99 years from 6.2.2007. The property was then resurveyed and a new grant issued to the 3<sup>rd</sup> Respondent upon conversion of the property to Nairobi /Block 42/118.
16. The 2<sup>nd</sup> Replying Affidavit of Brian Ikol is sworn and filed on 16.10.2023, where he takes a contrary view to his averments in his affidavit filed few days earlier on 5.10.2023. He avers that the 1<sup>st</sup> Respondent does not dispute that the late Gregory Ndambuki Muoki became registered proprietor of the suit property, and that the term of the lease was for 54 years from 1.1.1950 to 1.1.2004 thus the lease expired in the year 2004.
17. He admits that the late Gregory Ndambuki has been residing on the suit parcel and avers that he has knowledge of the existence of correspondence file No. 39084 with all the documents for the allocation and alienation in favour of the Petitioners, but he was unable to trace the documents purportedly issued to the 3<sup>rd</sup> Respondent by the defunct office of the Commissioner of Lands and was therefore unable to confirm their authenticity.
18. He avers that the Petitioners made an application for renewal of the lease on 18.8.2023 which has been approved by Nairobi County Government and that it is being processed by the 1st Respondent.
19. He avers that beneficiaries of the immediate past holder of the leasehold interest have pre-emptive rights to allocation of the suit land and that where the land reverts back to the government and the lessee is not willing to have the lease extended, the correct mode of allocation of the subject property should have been through a competitive process which was not undertaken.



### Case for the 2<sup>nd</sup> Respondent

19. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 15.6.2023 by George Gitonga, a land Registrar at the Ministry of Lands, Public Works, Housing and Urban Development. He avers that the land register maintained under the [Land Registration Act](#), 2012 in respect of land parcel No. Nairobi/Block 42 reflects the 3<sup>rd</sup> Respondent as the registered owner of the suit parcel as evidenced by entries made on the register on 30.3.2023 and that his ownership is as a result of a lease from the Government of Kenya for a term of 99 years effective from 1.2.2007 at the annual rent of ksh.19,000/=
20. He annexed a copy of the RTA title IR No. 7849, correspondences dated 8.2.2023, 28.2.2023, lease and certificate of lease in the 3<sup>rd</sup> Respondent's name, copy of green card and copy of white card showing that the 3<sup>rd</sup> Respondent is the current owner of the suit parcel.

### Case for the 3<sup>rd</sup> Respondent

21. The 3<sup>rd</sup> Respondent opposed the petition vide a replying affidavit sworn on 2.6.2023. He avers that on or about 11.1.2005, he applied to the Commissioner of Lands to be allocated a residential plot on LR No. 209/3271/71 which was approved and communicated by the Commissioner of lands vide a letter dated 14.6.2005.
22. That on 6.2.2007, he was issued with a letter of allotment for the suit parcel and on 28.2.2007, he wrote a letter of acceptance of the offer and enclosed bank cheques of ksh.145,620/= as required in the letter of allotment.
23. He avers that he is aware that the Commissioner of Lands did communicate to the District Surveyor of his acceptance of the letter of allotment and directed the District surveyor to proceed and survey the plot and issue a new grant.
24. That he paid all existing land rates and was subsequently issued with a new lease to the property and that the property underwent conversion and became Nairobi Block 42/118.

### Submissions

25. The Petitioners filed submissions dated 23.10.2023 where they have averred that their claim meets the threshold of a constitutional petition as set out in *Mumo Matemo v Trusted Society of Human Rights Alliance* [2014] eKLR, *Anarita Karimi Njeru v Republic (No.1)* [1979] KLR 154 and *Godfrey Paul Okutoyi v Habil Olaka & another* [2017] eKLR.
26. It is submitted that while issuing the 3<sup>rd</sup> Respondent with a lease to the suit parcel, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents never followed the statutorily laid down procedure in Section 13 and 14 of the [Land Registration Act](#) (they must have meant the [Land Act](#)), as well as the Procedure under the National Land Commission (Extension & Renewal of Leases) Regulations, 2017.
27. It is argued that failure by the 3<sup>rd</sup> Respondent to produce in evidence a survey plan, a part Development Plan (PDP) on which basis his allotment letter would be predicated upon can only yield one inference, that his certificate of title was procured through a fraudulent, illegal and improper enterprise. The case of *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as well as *African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa HCCC No. 276 of 2013* are relied upon.
28. It is submitted that the role of the 1<sup>st</sup> Respondent is not merely facilitative nor participatory in renewal of existing leases; it plays a central role, thus failure to issue sufficient notice to the Petitioners informing them of their pre-emptive rights to renew the lease and by extension members of the public is unlawful.



29. The Petitioners urged the court to award them general damages of not less than ksh.2 million. To this end, they cited the case of Jaohn Atelu Omilia & another v Attorney General & 4 others [2017] eKLR and the case of Lucas Omoto Wamari v Attorney General & another [2017] eKLR.
30. The 1<sup>st</sup> Respondent's submissions filed in the Court filing portal (CTS) are not legible.
31. The 2<sup>nd</sup> Respondent filed submissions dated 23.10.2023 and supplementary ones dated 12.1.2024. It is submitted that this court can only order cancellation of a title on an action by the registrar upon him being satisfied that the same was fraudulently/wrongfully obtained. The case of Tabarana Company Limited v Harchara Singh Sehmi and others Court of Appeal No. 463 of 2019 is cited.
32. It is argued that the process of issuance of extension of leases before the 2010 Constitution required any party whose lease was about to expire to apply to the then Commissioner of Lands for extension, and in this matter, the Petitioners never applied for extension until 18/8/2023 during the pendency of this suit.
33. It is submitted that upon receipt of the application for allocation by the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> Respondent exercised its constitutional mandate and allocated the suit parcel to the 3<sup>rd</sup> Respondent thus its actions were within its mandate. The case of Adan Abdirahani Hassan & 2 others v The Registrar of Titles, Ministry of Lands & 2 others [2013] eKLR is proffered.
34. It was also submitted that Section 13 of the Land Act and land (extension and renewal of leases) rules 2017 were not applicable in 2004 when the suit lease expired.
35. It is argued that the 1<sup>st</sup> Respondent has no mandate to walk around and check occupation of leases which have expired and advise occupants to apply, and that a pre-emption right applies when the leaseholder exercises his right and applies for renewal immediately and or before expiry of leases.
36. The 3<sup>rd</sup> Respondent filed written submissions dated 16.11.2023 as well as supplementary submissions dated 10.1.2024. It is submitted that for proprietary rights to be deemed as violated, a title must exist in the 1<sup>st</sup> place but the Petitioners' title if any was extinguished on 2.1.2004.
37. It is argued that since the Petitioners did not renew their lease, the property reverted to the state by operation of law and the 3<sup>rd</sup> Respondent followed all the laid down procedure when he obtained a lease. It is further argued that there is no evidence of coercion/fraud against the 3<sup>rd</sup> Respondent.
38. The 3<sup>rd</sup> Respondent urges the court not to consider the application for renewal of lease by the petitioner made on 18.8.2023 on account of orders of status quo issued on 19.9. 2023. To this end, the case of Republic v Environment Tribunal, Ex Partee Plam Homes Limited & Another [2013] eKLR as well as the case of TSS Spinning and Weaving; Company Ltd v Nic Bank Limited & another [2020] eKLR are relied upon.

### **Determination**

39. Before delving into the issues for determination, I find it necessary to clarify the status of the pleadings of the 1<sup>st</sup> respondent. As earlier noted, this respondent proffered two affidavits sworn by the same person in a span of 11 days!. They made an attempt to expunge the earlier affidavit but in a ruling dated 14.12 2023, the court declined the request after noting that they termed the petitioners as strangers to the suit property in the earlier affidavit, but in the latter one, they were identifying the petitioners as the rightful claimants of the suit land.



40. In the case of *Otieno Mogire v South Nyanza Sugar Co. LTD* [2018] eKLR, it was stated that;
- “It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”
41. In the instant case, it is the pleadings of the 1<sup>st</sup> respondent which are at variance, thus no probative value can be derived from them. The two affidavits are therefore disregarded.
42. I now proceed to frame the issues for determination as follows;
- a. Whether the Petitioners have established a proprietary interest in the suit parcel worthy of protection under Article 40 of *the Constitution*?
  - b. Whether the 1<sup>st</sup> Respondent violated the Petitioners’ pre-emptive rights.
  - c. Whether registration of the suit parcel to the 3<sup>rd</sup> Respondent is regular.
43. The first port of call relates to the issue of burden of proof. A court of law is required to direct itself on the question of burden of proof as was stated in the Court of Appeal case of; *Prafulla Enterprises Limited v Norlake Investments Limited & another* [2014] eKLR. Also see the provisions of Section 107-112 of the *Evidence Act*. The petitioners chose the route of advancing their claim through a petition, whereby, on 19.9.2023, their counsel addressed the court as follows; “We pray to be heard by way of written submissions” of which the court obliged.
44. To this end, the onus was upon the plaintiff to satisfy this court that indeed their rights to the suit property had been violated and they therefore deserve the orders sought.
45. The Petitioners’ case is that the Respondents have violated their pre-emptive rights under Section 13 (1) of the *Land Act*, their rights to property under Article 40 of *the Constitution* as well as their rights to Fair Administrative Action under Article 47 of *the Constitution*. The Petitioners also claim that the 1st Respondent violated land (Extension and Renewal of Leases) Rules, 2017.
46. They claim that the 1<sup>st</sup> Respondent allocated the suit property to the 3<sup>rd</sup> Respondent without giving them the priority to renew the lease for the suit parcel and that the 2<sup>nd</sup> Respondent issued the 3<sup>rd</sup> Respondent with a title without following due procedure.
47. It is not disputed that the lease to the contested parcel of land expired on 1.1. 2004. It follows that neither the *land Act* of 2012 nor the (Extension and renewal of leases) Rules, 2017 are applicable.
48. Having found that the lease herein had expired by 1.1.2004, it was necessary for the petitioners to commence the process of extension of the lease herein within the legal regime appertaining at that particular time (Year 2004).
49. However, the evidence on record is that the Petitioners applied for renewal of the lease 19 years later on 18.8.2023 during the pendency of this suit. Were they entitled to be given 1<sup>st</sup> priority in the renewal process? Courts have held that a holder of a lease has a legitimate expectation that their leases would be renewed. See - *Abdul Waheed Sheikh and Abdul Hameed Sheikh as Charitable Trustees of the Sheikh Fazal Ilachi Noordin Trust v Commissioner of Lands & 3 Others*, Nairobi High Court, Misc. Civil Case No. 1531 of 2005 (O.S) (2012) eKLR and the case of *Republic v National Land Commission & 5 others; C.E.C Land Housing and Physical Planning Uasin Gishu County & 2 others* (Interested



Parties); Ravindra Ratilal Taylor (Suing as the Trustee of Uasin Gishu Arts Society of Eldoret) & 5 others (Exparte) (Suing as the Trustees of Uasin Gishu Arts Society of Eldoret) (Judicial Review 09 of 2017 & 04 of 2016 (Consolidated)) [2022] KEELC 3 (KLR) (16 February 2022) (Judgment).

50. A similar holding was reached in the case of Kenya Industrial Estates Limited v Anne Chepsiror & 5 others [2015] eKLR, where the court held as follows;

“I have every conviction to hold, and I do hold, that a former holder of a Government leasehold title, who had complied with the terms of the lease, held a legitimate expectation that such lease would be renewed to him by the Commissioner of Lands. It is my considered view, that despite there not being any explicit provision in the GLA, concerning renewal of leases of developed town plots, such plots needed to be renewed to the previous leaseholder, unless the leaseholder had breached a fundamental term of the lease, or is no longer interested in its renewal.”

51. It is the considered view of this court that in addition to complying with terms of the lease, a lessee who applies for renewal even before the lease lapses or one who applies for the same immediately after the lease lapses would have the legitimate expectation as opposed to a lessee who does not actively follow up renewal. The Petitioners admit that they only applied for renewal in 2023, 19 years after the lease had lapsed. This kind of indolence is inexcusable and does not aid a case for legitimate expectation.

52. For the said reason, the Petitioners have not established a proprietary interest in the suit property which is worthy of protection.

53. This is a situation where the lessee did not express any interest in the renewal of the same, hence the issue of invoking pre-emptive rights are misplaced.

54. I find that by and large, the petitioners attempted to shift the burden of proof upon the 3<sup>rd</sup> Respondent which flies against the rules of evidence. If the petitioners desired to challenge the title held by the 3<sup>rd</sup> defendant, they ought to have lodged an ordinary suit to enable the parties to file relevant pleadings, where the evidence would be subjected to the rigors of cross-examination.

55. In the case of Ernest Ikoha & 19 others v. County Government of Kakamega [2020] eKLR, the court stated that:

“A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts, then the petitioner ought to revert to a civil claim. Constitutional jurisdiction should not be trivialized and should be confined to purely constitutional matters. Where the ordinary law provides for relief, that relief must be pursued. For those reasons I find this petition is not merited and I dismiss it with costs.”

56. This is a situation whereby the petitioners have pleaded irregularity, fraud, illegality and procedural defects in the manner that the land was allocated to the 3<sup>rd</sup> respondent. Such particulars ought to be framed and proved in an ordinary suit.



57. In the case of Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

58. I find that the petitioners have failed to proof their case, thus, this court cannot turn round to interrogate the validity of the title of the respondent, more so when no counterclaim was tendered. In the end, I find that this petition is not merited, the same is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Alexander Mwendwa and Winnie Akinyi for the Petitioner

M/s Njuguna for 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

Alosa for 3<sup>rd</sup> Respondent

Court assistant: Eddel

