



REPUBLIC OF KENYA



KENYA LAW

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**Kanyuira v National Land Commission & 4 others (Environment & Land
Petition 9 of 2023) [2024] KEELC 6386 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND PETITION 9 OF 2023**

YM ANGIMA, J

SEPTEMBER 26, 2024

BETWEEN

GERALD GIKONYO KANYUIRA PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

BOARD OF MANAGEMENT WERU PRIMARY SCHOOL ... 4TH RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA 5TH RESPONDENT

JUDGMENT

A. Petitioners' Claim

1. By a petition dated 28.06.2019 and amended on or about 15.02.2022 the Petitioner sought the following reliefs:
 - a. A declaration that the actions of the Respondents jointly and/or severally are a violation of the Petitioner's rights protected under the Constitution of Kenya Articles 10, 23, 27, 28, 40, 43, 27, 48 & 64.
 - b. An order of prohibition directed at the Respondents jointly and/or severally their agents, assigns, employees or servants permanently barring them from interfering in any manner whatsoever or taking any action in so far as all that land is known as Title No, Nyandarua/Migaa Township Plot No. 11 measuring 0.067 hectares is concerned.
 - c. An order of mandamus directed at the Respondents jointly and/or severally their servants, employees or assigns or agents, to value all that is known as Land Tile No. Nyandarua/Migaa



Township Plot No. 11 measuring 0.067 hectares and adequately compensate the Petitioner with a land of a similar value and/or monetary compensation to the tune of three million four hundred and thirty thousand two hundred (Kshs.3,430,200/=) being the value of the land, trees and mesne profits.

- d. An order that costs of this petition be borne by the Respondents.
2. The Petitioner pleaded that he was the legitimate owner of Title No. Nyandarua/Migaa/Township Plot No. 11 (Plot 11) measuring about 0.067 ha by virtue of an allocation from the government of Kenya. He pleaded that the government issued him with a lease for Plot 11 on 17.07.1980 whereas a certificate of lease was issued to him on 23.08.1980 under the Registration of Titles Act (RTA) now repealed. The lease was said to be for a period of 99 years with effect from 01.07.1978.
3. It was the Petitioner's pleading that sometime in 2018 he discovered that the 4th Respondent had encroached upon Plot 11 by fencing it as part of the school compound and planting trees thereon thereby making it impossible for him to take possession and develop the same. The Petitioner further pleaded that his efforts in seeking assistance from various government offices in order to recover Plot 11 had become futile.
4. The Petitioner thus contended that the Respondents had by their conduct violated his constitutional rights under Articles 10, 23, 27, 28, 40, 43, 47, 48 and 64 of the Constitution of Kenya in relation to Plot 11 thereby rendering the petition necessary.

B. Respondent's Response

5. The record shows that although the 1st Respondent filed a memorandum of appearance to the petition on 13.01.2020, it did not file any replying affidavit or other response thereto. Similarly, the 5th Respondent entered appearance but there is no indication on record that it filed an answer to the petition.
6. The Attorney General appeared for the 2nd – 4th Respondents and filed a notice of preliminary objection dated 09.11.2020 raising the following general grounds:
 - a. That the petition does not meet the minimum principles set out under the Anarita Karimi case.
 - b. That the petition herein violates the Doctrine of Constitutional Avoidance and should be dismissed forthwith.
 - c. That the petition does not disclose adequate particulars in support of the alleged violations of the Constitution and other quoted laws, to enable the court to grant the reliefs sought.
 - d. That the petition is general, speculative and does not disclose a real dispute capable of resolution by this honourable court and as such is scandalous, frivolous, vexatious and an abuse of the judicial process.
 - e. That the jurisdiction to interpret the Constitution conferred by Article 165(3) can only be invoked by this honourable court when there are real and specific issues in controversy.
 - f. That the Petitioner does not disclose any legal and justifiable claim against the 2nd and 4th Respondents.
 - g. That the petition is pre-mature, baseless and an abuse of court process.
 - h. That on the foregoing the application and petition is incurably defective, misconceived and a proper candidate for dismissal with costs to the Respondents.



7. The Attorney General also filed a replying affidavit sworn by Kenda R. Minai on 14.06.2021. He pleaded that he was the head teacher and Secretary of the Board of Management of the school hence conversant with the matters in issue in the petition. It was contended that the instant petition was filed merely to evade the application of the Limitation of Actions Act (Cap.22) and had nothing to do with violation or enforcement of constitutional rights.
8. The deponent pleaded that the school was the legitimate owner of Title No. Nyandarua/OlJOROROK Salient/15959 (Parcel 15959) measuring about 9.9 ha and that it was issued with a title deed for the land on 17.03.2005. It was further pleaded that the school had been in occupation of Parcel 15959 since it was established in 1966 hence the Petitioner had no legitimate claim to any portion thereof. The rest of the averments in the replying affidavit were merely a repetition of the grounds set out in the notice of preliminary objection.

C. Hearing of the petition

9. When the petition was listed for directions it was directed that it shall be canvassed through oral and documentary evidence. The record shows that the Petitioner called 3 witnesses at the trial whereas the 2nd – 4th Respondents called one. The 1st and 5th Respondents did not tender any evidence at the trial.
10. The Petitioner who testified as PW2 adopted the contents of his supporting affidavit, supplementary affidavit and witness statement as his evidence in chief. He also produced the documents in his list of documents as exhibits P1 – P20. He also called his son, Stanley Gikonyo, who testified as PW1. His evidence was essentially a copycat of the Petitioner's evidence. The Petitioner's third witness was John K. Karuga who was a licensed surveyor. It was the surveyor's evidence that the Petitioner was the first allottee of Plot 11 but the defunct County Council of Nyandarua later on allocated the same to the school thereby creating an overlap.
11. The 2nd – 4th Respondent called the current head teacher of the school, Joseph Maina Waigwa since Kenda R. Minai had retired by the time of the trial. He adopted the contents of his witness statement dated 09.07.2024 as his evidence in chief. The said statement was a replica of the replying affidavit sworn by Kenda R. Minai on 14.06.2021. The gist of his evidence that the school was legally allocated its land and was issued with a title deed on 17.03.2005. It was his evidence that the school had been in possession of the entire land comprised in Parcel 15959 since 1966 and that he was not aware if the Petitioner had a title for part of the land. The witness was unable to tell when the school was allocated the land but he produced copies of the relevant green cards and a copy of title deed.

D. Directions on Submissions

12. Upon conclusion of the trial the parties were given timeless within which to file and exchange their respective submissions. The record shows that the Petitioner filed written submissions on 05.09.2024 whereas the Attorney General's submissions were filed on 04.09.2024. The 5th Respondent's submissions were filed on 16.09.2024 but the 1st Respondent did not file any.

E. Issues for Determination

13. The court has perused the contents of the amended petition, the Attorney General's replying affidavit and grounds of opposition, and the material on record. The court is of the view that the main issues for determination herein are the following:
 - a. Whether the Petitioner is the legitimate owner of Plot No. 11.



- b. Whether any of the Petitioner’s constitutional rights have been violated in relation to Plot No. 11.
- c. Whether the Petitioner is entitled to the reliefs sought in the petition.
- d. Who shall bear costs of the petition.

F. Analysis and Determination

Whether the Petitioner is the legitimate owner of Plot No. 11

- 14. The court has considered the material and submissions on record on this issue. Whereas DW1 termed Plot No. 11 as non-existent in government records, the documentary evidence on record shows otherwise. The record shows that when the petition was pending before Hon. Justice M.C. Oundo she made orders dated 11.11.2019, 14.01.2020 and 30.09.2020 requiring the County Land Surveyor to visit the disputed land to resurvey, demarcate and establish the boundaries of Plot No. 11 and file the relevant report in court. The said orders were ultimately executed on 09.11.2020 whereupon the district surveyor filed a report dated 23.11.2020.
- 15. In his report, the government surveyor stated as follows:

“The above plot was visited on 09.11.2020 to demarcate it as per the order issued on 05.10.2020. The plot position was positively identified using the official map from Survey of Kenya office and the beacon positions established. It was found that the plot is actually located within Weru Primary School Compound. It is also worth noting that both the school and Plot No. 11 have titles, that is, it is a situation of overlapping titles. The school title was produced under the Registration of Lands Act (sic) (RLA) whereas Plot No. 11 was produced under the Registration of Titles Act (RTA).”
- 16. It is also evident from the documentary evidence produced by the Petitioner at the trial that he was given a leasehold interest by the government of Kenya in 1980 for a period of 99 years with effect from 01.07.1978 and was subsequently issued with a certificate of lease on 23.08.1980. There is no credible evidence on record to demonstrate that the said lease or certificate of lease were ever recalled or nullified. The court is thus satisfied on the basis of the evidence on record that Plot No. 11 is actually in existence both on the ground and in government records and that the Petitioner is the legitimate owner thereof.

Whether any of the Petitioner’s constitutional rights have been violated in relation to Plot No. 11

- 17. The court has considered the material and submissions on record on this issue. Although the Petitioner cited numerous articles of the *Constitution* as having been violated in relation to him, the court is of the opinion that only one article is directly relevant to the Petitioner’s claim. This is Article 40 of the *Constitution*.
- 18. The court has already found that the Petitioner is the legitimate owner of Plot No. 11 and as such he is entitled to enjoy the bundle rights which come with such ownership. Such rights would include the rights to entry, use and quiet enjoyment. The court believes the evidence on record to the effect that the school has fenced off Plot No. 11 and planted trees thereon. It now forms part of the school compound hence the Petitioner is unable to access and utilize the same.
- 19. The court is aware that the current situation arose due to overlapping allocations by concerned government agencies which resulted into two title documents being issued under two different registration regimes. It is evident from the material on record that the Petitioner’s allocation took place



at least by 1980 and a certificate of lease was issued to him in the same year. On the other hand, the school does not know when the subject land was allocated to it even though it was ultimately issued with a title deed in 2005.

20. It is highly improbable that the school was allocated Plot No. 11 to form part of its land in 1966 because the approved Part Development Plan which was produced by PW3 was approved on 02.11.1967 and it showed the school Plot and Plot No. 11 as separate and distinct plots which did not even border each other. The court is further of the opinion that by the time the Petitioner's lease was issued in 1980 the position was still the same. The court is inclined to accept the report of PW3 to the effect that the school was allocated the additional land (including Plot No. 11) by the Department of Settlement which may not have been aware of the earlier allocations by the government.
21. Thus, by the time the land comprised in plot No. 11 was being re-allocated to the school due process was not followed in expropriating it from the Petitioner in the first place. There was no indication to show that he was accorded an opportunity of being heard before deprivation of his property. There is also no indication on record to the effect that the Petitioner was compensated for the loss of his land. The court is thus of the opinion that the Petitioner has adequately demonstrated he was unfairly and illegally deprived of his property by the 2nd – 4th Respondents without any form of compensation.

Whether the Petitioner is entitled to the reliefs sought in the petition

22. In view of the court's finding that the Petitioner has demonstrated violation of his property rights under Article 40 in relation to Plot No. 11, the court has no hesitation in granting a declaration to the effect that the 2nd – 4th Respondents have jointly and severally violated the Petitioner's rights to property under Article 40 of the Constitution of Kenya. There shall be no similar declaration against the 1st and 5th Respondents since their role, if any, in the alleged violation was not demonstrated at the trial.
23. The court is not inclined to grant the order of prohibition sought because the Petitioner has also sought an order for compensation for the value of his Plot No. 11 which the court thinks will adequately compensate the Petitioner. The Petitioner produced a valuation report dated 01.07.2019 which valued his land at Kshs.1,600,000/=. The court is inclined to award the Petitioner this amount but it is not inclined to award him Kshs.130,200/= as compensation for trees since he did not plant those trees. The court is also not inclined to award him Kshs.1,700,000/= as mesne profits since the amount was not adequately proved at the trial.

Who shall bear costs of the petition

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. However, since the overlapping allocations were occasioned by the 2nd Respondent, the said Respondent shall bear the Petitioner's costs. The rest of the Respondents shall bear their own costs.

G. Conclusion and Disposal Orders

25. The upshot of the foregoing is that the court finds and holds that the Petitioner has proved his claim to the required standard to the extent shown hereunder. As a consequence, the court makes the following orders for disposal of the petition:



- a. A declaration be and is hereby made that the 2nd – 4th Respondents have jointly and severally violated the Petitioner’s right to property under Article 40 of the Constitution of Kenya.
- b. The Petitioner is hereby awarded compensation in the sum of Kshs.1,600,000/= for loss of his property known as No. Nyandarua/Migaa Township Plot No. 11 as against the 2nd – 4th Respondents jointly and severally.
- c. The Petitioner is hereby awarded costs of the petition to be borne by the 2nd Respondent only.
- d. The claim against the 1st and 5th Respondents is hereby dismissed but they shall bear their own costs.
- e. Any relief sought but not specifically granted herein is deemed to have been denied.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 26TH DAY OF SEPTEMBER, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Ojienda for the Petitioner

Ms. Mumbi Murigu for the 1st Respondent

N/A for the A.G. for the 2nd – 4th Respondents

Ms. Njeri Wanjiru for the 5th Respondent

C/A - Carol

