



Korir & 3 others v County Government of Bomet & 3 others (Environment & Land Petition 1 of 2020) [2023] KEELC 309 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND PETITION 1 OF 2020
MC OUNDO, J
JANUARY 26, 2023**

BETWEEN

**KIPKIRUI DANIEL KORIR 1ST PETITIONER
PAUL SANGA 2ND PETITIONER
JOHN KIPKELONG KIRUI 3RD PETITIONER
WILLIAM KIPLANGAT MARUSOI 4TH PETITIONER**

AND

**COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT
COUNTY SECRETARY- COUNTY OF BOMET 2ND RESPONDENT
BOMET COUNTY EXECUTIVE MEMBER FOR FINANCE .. 3RD RESPONDENT
BOMET COUNTY EXECUTIVE MEMBER FOR LANDS 4TH RESPONDENT**

JUDGMENT

1. The Petitioners herein, via their Petition of 13th January 20120 seek for the following orders;
 - i. A declaration that the Respondents violated the Petitioner’s right to own property.
 - ii. A declaration that the Petitioners are entitled to their land parcels as per the letters of allotment.
 - iii. A permanent injunction prohibiting market activities in the Petitioners land parcels at Kapkwen area within Bomet County.
 - iv. Compensation to each of the Petitioners for losses incurred as a consequence of violation of their Constitutional rights.
 - v. General Damages.



- vi. Costs of this Petition.
2. The Petition was supported by an Affidavit sworn by the 3rd Petitioner John Kipkelong Kirui on the 14th October 2019 to the effect that they were businessmen trading in Kapkwen Market within Bomet County. That they had been allocated land parcels by the then Bomet Municipal Council and/or the County Council of Kipsigis and had been in occupation of the said land parcels for a period of over 10 years.
 3. That whereas the 1st Petitioner Kipkirui Daniel Korir, had been allocated plot No. 142, Block; Itembe, the 2nd Petitioner Paul Sanga had been allocated No. 26, Block; he had been allotted No. 44, Block; Itembe while the 4th Petitioner No. 82, Block; Itembe wherein they had been paying rates for their respective plots yearly to the County Government of Bomet which had subdivided and shown the Petitioners their respective parcels.
 4. That it had been upon being allocated the said plots, that the Petitioners had bought construction materials with an aim of developing the said plots so as to utilize them in undertaking their business activities at Kapkwen center. subsequently on or before August 2019, the Respondents unlawfully demolished the structures constructed by the Petitioners so as to create space for market activities on Tuesdays because traders had been issued with a notice to avoid trading alongside road reserves in Kapkwen but to instead utilize the market space in Kapsimotwo market. As a consequence thereof, the plots belonging to the Petitioners were illegally acquired by the Respondents occasioning them heavy losses. That the Respondents had also continued to illegally collect taxes from the traders trading in the Petitioners' land despite the Petitioners having paid rates to utilize the same.
 5. Alongside the Petition, the Petitioners had also filed an application of an equal date for interim orders of injunction against the Respondents, their agents and/or servants seeking that they be restrained from conducting market activities on the Petitioners' parcels of land every Tuesdays of the week. The said application was later abandoned on the 30th June 2020.
 6. The Application and Petition were responded to through a Replying Affidavit dated 25th June 2020 sworn by the Deputy County Governor of the 1st Respondent who was also the Acting County Executive Committee Member for the Department of Lands, Housing and Urban Planning herein joined as the 4th Respondent to the effect that the entire Petition did not meet the cardinal rule of "he who alleges must prove". He denied the allegations brought forth by the Petitioners that plots Nos. 142, 26, 44 and 82 located at Itembe, Bomet belonged to them after they had been allocated by the then Bomet Municipal Council and/or County Council of Kipsigis wherein they had been in occupation for a period of 10 years.
 7. He further depond that the Petitioners had no locus standi to bring this Petition as there was no proof of ownership of the said land parcels since a letter of allotment was not conclusive proof of ownership as was held in the case of *Stephen Mburu and 4 Others vs Comat Merchants Ltd and Another* [2012] eKLR.
 8. That the Petitioners' allegation that they had been paying land rates for plots Nos. 142, 26, 44 and 82 located at Itembe, Bomet to the County Government of Bomet through the department responsible for collection of revenue had not been proved through any certified and authenticated proof of payment of the alleged land rates to the County Government of Bomet.
 9. That the mandate of Bomet County Government was to levy, impose and collect taxes as is clearly established under Article 209(3) of *the Constitution*. That further, it was not true that the plots had been sub divided prior to alienation by the Respondents. That the Petitioners' allegations of ownership



- of land were incorrect and informed by ignorance of the law since they had failed to satisfy the legal provisions of the law on ownership of land under Section 26(1) of the *Land Registration Act*.
10. That no structures constructed by the Petitioners had been demolished and neither was there any Environmental Audit provided illustrating that the market activities at Kapkwen area were likely to have significant effect on the Environment, as was expected pursuant to the provisions of Section 68 of the *Environment Management and Coordination Act*.
 11. That the suit plots were not illegally acquired by the Respondents. Kapsimotwo area was not specifically gazetted as a market and should not be the sole location within Bomet Municipality area where members of the public could conduct their market activities. That further, it was not true that the 3rd Respondent had continued to illegally collect taxes from the traders, trading in the Petitioners' plots despite them having paid rates. That to the best of his knowledge and understanding, the 4th Schedule Part 7 of *the Constitution* of Kenya mandated trade development and regulations including markets and trade licenses as a function of the County Governments. The Respondents were thus within its powers as assigned by the law to collect market fees for market activities within its jurisdiction.
 12. That the Petitioners Petition was incurably defective to the extent that it merely recited the Articles of *the Constitution* and did not with clarity state the manner in which the various provisions of *the Constitution* had been violated by the Respondents and therefore was an insult to the well-established principles in *Mumo Matemu vs Trusted Society of Human Rights Alliance* Civil Appeal No. 290 of 2012. That the Petition was bad in law and the same ought to be dismissed with costs.
 13. On the 14th July 2022, despite directions having been taken that the Petition be disposed of by way of written submissions, only the Petitioners complied and filed their written submissions on the 22nd September 2022 which submissions I shall summarize as herein under.

Petitioners' submissions

14. The Petitioners summed up the brief facts of the matter before framing their issues for determination as follows:
 - i. Whether the Petitioner's (sic) right to own property has been violated by the Respondents?
 - ii. Whether the Petitioners are entitled to their plots as per the letters of allotment?
 - iii. Whether a permanent injunction prohibiting all market activities in the Petitioners' parcels should be issued.
 - iv. Whether the Petitioners should be compensated for the losses incurred as a consequence of violation of their Constitutional rights?
 - v. Whether the Petitioners are entitled to general damages?
 - vi. Who should bear the costs of the Petition?
15. On the first issue for determination, the Petitioners submitted that the illegal acquisition of the Petitioners' plots by the Respondents (to allow space for market activities) had occasioned heavy losses and inability for them to provide for their families thus violating their right to own property as enshrined under Article 40(1) of *the Constitution* of Kenya whereby the Petitioners had every right to own the plots Nos. 142, 26, 44 and 82, Itembe Market.



16. That the Petitioners had attached copies of their allotments letters, receipts and notifications from the Respondents to prove that they were rightful and legal owners of the plots 142, 26, 44 and 82, Itembe Market and had at all times been paying the rates for the same as per annexures marked as PS 1 PS2 PS 3 PS4 KD1-2 RS 1-3 JK-1 WK 1-2 and SL-1.
17. That the allotment letters and receipts inclusive of the notifications were prima facie evidence of ownership as was held in the Meru ELCA No. 34 OF 2015 *Abdia Dabaso vs Sangab Kalicha Huka*. That with this in mind, the actions of the Respondents in aiding the invasion of the Petitioners' plots was not in tandem with *the Constitution*. That had the Respondents sought to take back the plots, they ought to have followed the set down procedure in Article 40(3) of *the Constitution*.
18. That in the present circumstances, it was clear that the Respondents had not taken any of the steps or done the things provided for in *the Constitution* in relation to the plots and had therefore violated the Petitioners' right to own property.
19. Reliance was placed in Kitale ELC Petition No. 2 of 2020 *Wilfred Juma Wasike & 11 Others vs Ministry of Interior and Co-ordination & Another* where the court had found that violation of Article 40 of *the Constitution* had amounted to deprivation of the right to own property. That the actions of the Respondents of invading the property, unlawfully demolishing the structures constructed by the Petitioners and/or removing construction materials bought by the Petitioners in order to get space for market activities on Tuesdays was a great onslaught on the rights of the Petitioners to own property and this was done notwithstanding the fact that the same Respondent had gazetted Kapsimotwo as a market place.
20. On the second issue for determination, the Petitioners, relied on the authorities herein earlier alluded, to submit that they were the rightful and legal owners of the plots, and hence were entitled to them. Reference was further made to the decisions in Machakos ELC Constitutional Petition No. 2B of 2019 *Patrick Mukuno Kisilu & 4 Others vs. County Government of Kitui & 4 Others*.
21. On the third issue for determination as to whether a permanent injunction prohibiting all market activities in the Petitioner's parcels should be issued, the Petitioners' response was in the affirmative, stating that they had already proved that they were the rightful and legal owners of the plots 142, 26, 44 and 82, Itembe Market. The Petitioners relied on the provisions of Article 23 of *the Constitution* to show the number of reliefs that the court could issue. That they had demonstrated, as was held in the case of *Giella v Cassman Brown* (sic) that the Petitioners deserved the orders of injunction against the Respondents since they had proved prima facie, that they were the legal owners of the plots aforementioned as evidenced by the allotment letters. That the Respondents had not filed any document to controvert this position.
22. On the issue of irreparable injury, the Petitioners submitted that since they were the legal owners of the plots, they had been unable to utilize the same because of the actions of the Respondents of taking away their construction materials and destroying their structures hence the Petitioners could not develop their plots and this caused them to suffer irreparably. That to this effect they had demonstrated that they would suffer irreparable injury, Reliance was placed on the case in Kerugoya ELC Case No. 192 of 2016. *Hellen Micere Mugeru vs Charity Wairimu Mwangi & Another* to submit that having ably established a prima facie case and proved that they stood to suffer irreparably, the balance of convenience tilted in their favour.
23. That in Machakos ELC, Constitutional Petition No. 2B of 2019 *Patrick Mukuno Kisilu & 4 Others vs County Government of Kitui & 4 Others*, the court had held that having found that the 1st Respondent had allotted the land to the Petitioners lawfully, there had been an order of permanent injunction issued



- against the Respondents restraining them from interfering with the Petitioners' rights and interests in their respective plots. That in the same vein, the plots having been allotted to the Petitioners lawfully, it was only fair and just to issue an order of permanent injunction against the Respondents, prohibiting all market activities.
24. On the fourth issue for determination, as to whether the Petitioners should be compensated for the losses incurred as a consequence of violation of their Constitutional rights, the Petitioners submitted in affirmative for reasons that since they had proved that their rights had been infringed, and that the parcels of land belonged to them, and further that they had been paying monthly rates to the Respondents yet they hadn't been utilizing their plots fully, that it was only fair that they be compensated. Reliance was placed on the decided case in Wilfred Juma (supra) where the court had awarded the Petitioners therein a compensatory relief of Kshs. 2,000,000/= despite them not having pleaded the quantum.
25. On the issue as to whether the Petitioners were entitled to general damages, the answer was again in the affirmative for reasons there was invasion on their plots and demolitions of their structures which was unlawful, malicious and illegal. That no explanation had been preferred for such a heinous act. That having proved as such, it was only trite and just that the Petitioners be compensated by an award of damages to cover up for their loss as was held in Mombasa ELC Case No. 236 of 2013, *Naomi Ngare vs Municipal Council of Mombasa & Another* wherein general damages of Kshs. 2,000,000/= had been awarded as compensation for demolition of structures.
26. On the last issue in regard to costs, the Petitioners opined that costs generally follow the event. That the court do exercise its judicial discretion as set out under Section 27(1) of the *Civil Procedure Act* to award costs to them since it had been the Respondents who had necessitated the current Petition and therefore they should bear the costs.

Determination.

27. I have considered the contents of the Petitioners' Petition, their Affidavit in support, as well as their arguments and the authorities herein cited. The Petitioners bring this Petition alleging violation of their right to own property in terms of Article 40 of *the Constitution*. The Respondents having not filed their submissions as directed by the court would mean in effect that the Petition was unopposed, however this notwithstanding, I shall have to determine the same on its merit.
28. In *Anarita Katimi Njeru vs The Republic* [1979] eKLR the court held that:
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
29. Having reviewed the Petition and supporting affidavit, I find that the Petitioners have set out with a reasonable degree of precision that their Constitutional rights envisaged under Article 40 of *the Constitution* had been violated by the Respondents to wit that after having been allotted plots Nos. 142, 26, 44 and 82 located at Block Itembe, Bomet, respectively by the then Bomet Municipal Council and/or County Council of Kipsigis, they had bought construction materials with an aim of developing the said plots so as to utilize them in undertaking their business activities at Kapkwen center. That on or before August 2019, the Respondents had unlawfully demolished the structures constructed by the Petitioners so as to create space for market activities on Tuesdays because traders had been issued with a notice to avoid trading alongside road reserves in Kapkwen but to instead utilize the market space in



Kapsimotwo market. As a consequence thereof, the plots belonging to the Petitioners who had been in occupation for a period of 10 years had been illegally acquired by the Respondents thus depriving them off their Constitutional right to own property.

30. I therefore find the Issues for determination as follows;

- i. Whether Article 40 of *the Constitution* was violated.
- ii. Whether the Petitioner is entitled to the reliefs sought in the Petition.

31. Section 26 (1) of the *Land Registration Act* provides:-

- (1) The certificate of title 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.

32. The Registration of Titles to a piece of land emphasizes on the accuracy of the land register so as to mirror all registerable interests that affect a particular parcel of land. The Government, as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration only the person affected is guaranteed of government compensation.

33. An allotment letter as has been held by the courts do not confer ownership to land, but is just a letter of offer. Indeed a person holding an allotment letter has to proof that they have met the conditions stipulated therein to wit, paying the stand premium, rent, conveyancing fees, registration fees, stamp duty, survey fees, approval and planning fees as stated in the letter. Indeed it could therefore not be said that the Petitioners proprietary interest to the plots of land had been infringed by the Respondents merely because they had in their possession letters of allotment.

34. In the case of *Philma Farm Produce & Supplies & 4 others vs. The Attorney General & 6 others* (2012) eKLR, the court held as follows:

“The Petitioners’ claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the Petitioner claim must fail...”



35. Indeed in the case *Marcus Mutua Muluvi & Another vs. Philip Tonui & Another* [2012] eKLR the court had also held as follows:

“The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the Respondent, their claim to the suit premises being anchored on letters of allotment.”

36. Further in the case of *Dr. Joseph N.K. Arap Ng’ok v Justice Moiyo Ole Keiyua & 4 Others* C.A.60/1997 the Court of Appeal had held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all.”

37. lastly, in *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Mubumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* [2021] eKLR the court had held that:

“Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.”

38. The provisions of Article 40 of *the Constitution* provide as follows;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; andSUBPARA (b)
in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or



- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

39. Article 40(1) sets out the general right of every Kenyan to acquire and own property. The Petitioners' complaint was based on the allegation that having been allotted their respective parcels of land, the Respondents had unlawfully demolished their structures constructed therein so as to create space for market activities since the market had been moved from Kapkwen to Kapsimotwo. Their argument was that an allotment letter was sufficient proof of ownership of land and that they had been making the necessary statutory payments of land rates to the County Government of Bomet.

40. The thrust of Article 40 of *the Constitution* is to protect proprietary rights under the law and which rights are grounded in the statutes and in *the Constitution* and due process is paramount when dealing with proprietary rights. It was therefore incumbent of the Petitioners to justify the ownership of their respective plots by producing ownership documents to the parcels of land.

41. In the end, I find that letters of allotment are not registerable instruments that can be used to protect proprietary rights over land. The Petitioners herein do not have any legal or proprietary interest in the suit properties capable of protection or enforcement under the provisions of Article 40 of *the Constitution* and are therefore not entitled to the reliefs sought in their which is herein dismissed with costs at a lower scale since the same was undefended.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 26TH DAY OF JANUARY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

