



**Kapiti Plains Estate Limited v Attorney General & 3 others (Petition 2 of 2017 & Environment & Land Case 52 of 2017 (Consolidated)) [2023] KEELC 401 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 401 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**PETITION 2 OF 2017 & ENVIRONMENT & LAND CASE 52 OF 2017 (CONSOLIDATED)**  
**A NYUKURI, J**  
**JANUARY 25, 2023**

**BETWEEN**

**KAPITI PLAINS ESTATE LIMITED ..... PETITIONER**

**AND**

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

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF SURVEY OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**EVALINE MBITHE MUKUNZI, CATHERINE MWIKALI WAMBUA, SAMUEL MBUGUA KARIUKI, STANLEY MACHUHI KIMUNYA (ALL SUED AS THE NAMED ALLOTTEES AND OFFICIALS OF NEW KONZA RANCH ASSOCIATION) ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Petition dated 1<sup>st</sup> March 2017 anchored on the supporting affidavit sworn on 28<sup>th</sup> February 2017 by Simon Kibiru, the farm manager of the Petitioner, the Petitioner sued the Respondents herein and sought the following orders;
  - a. A declaration that the letter of allotment dated 23<sup>rd</sup> August 1994, ref. no. 12614/III/122; Konza Block 7374/5 – Machakos and addressed to New Konza Ranch Association was and is ultra vires of *the Constitution* of Kenya (repealed) and Constitution of Kenya 2010, and also in excess of power vested upon the Commissioner of Lands or any other officer or person in allocating land and is therefore null and void.
  - b. A declaration that the letter of allotment dated 5<sup>th</sup> July 2010, ref. no. 30197/IX; uns. Agricultural Plot ‘A’ – Konza Machakos in so far as it relates to any of the properties listed in



the Petition as belonging to the Petitioner is ultra vires of *the Constitution* of Kenya (repealed) and Constitution of Kenya 2010, and also in excess of power vested upon the Commissioner of Lands or any other officer or person in allocating land and therefore null and void.

- c. A declaration that any allocation of any of the Petitioner's properties or portions of them; viz. I.R. 5114 (L.R. No. 7374/4); I.R. No. 10055/1 (L.R. No. 8332); I.R. No. 940 (L.R. No. 1731/1) and I.R. No. 15988 (L.R. No. 9918/4) is a violation of the Petitioner's rights as enshrined under Article 40 of *the Constitution* of Kenya 2010.
  - d. A declaration that any allocation or alienation of any of the Petitioner's property without due process is a violation of the Petitioner's right to a fair administrative process as enshrined under Article 47 of *the Constitution* of Kenya 2010.
  - e. A conservatory order restraining any person claiming interest through the purported allocation of any portion the Petitioner's land, whether by themselves, by agent(s), servant(s) or by any other description from entering into or in any manner occupying any of the Petitioner's properties; viz. I.R. 5114 (L.R. No. 7374/4); I.R. No. 10055/1 (L.R. No. 8332); I.R. No. 940 (L.R. No. 1731/1) and I.R. No. 15988 (L.R. No. 9918/4).
  - f. Such other and/or further relief as this court may deem fit to grant.
  - g. An order of costs be provided for.
2. Subsequently, the 4<sup>th</sup> Respondent filed a plaint vide ELC Case No. 52 of 2017 against the Petitioner seeking the following orders;
- a. An order of permanent injunction restraining the defendant whether by itself, its agents, servants or persons acting under their authority or behalf from entering upon or otherwise interfering with the plaintiffs quiet use and occupation of plot otherwise known as Uns .Agricultural Plot No. "A" Konza Machakos.
  - b. A declaration that parcel of land otherwise known as Un. Surveyed Agricultural Plot No. "A" Konza Machakos rightfully owned by the plaintiff and a consequential order of eviction and demolition issued against the defendant whether by itself, its agents, servants or persons claiming on their behalf from the said parcel of land.
  - c. Costs of the suit.
  - d. Any other or further relief as this honourable court may deem fit and proper to grant.
3. On 13<sup>th</sup> June 2017, by consent of both parties, ELC Petition No. 2 of 2017 was consolidated with ELC Suit No. 52 of 2017, the lead file being Petition No. 2 of 2017. On 18<sup>th</sup> October 2018, parties were directed to file submissions in canvassing their respective claims.

### **The Petitioner's Case**

4. In the Petition together with the supporting affidavit thereto, the Petitioner described themselves as a public limited liability company and averred that the acquisition of their entire issued share capital was done by the International Livestock Research Institute (ILRI) with a research mandate in livestock and related activities. The Petitioner further stated that they were the registered proprietor of all those parcels of land known as IR. No. 5114 (LR No. 7374/4) IR No 10055/1 (LR No. 8332) and IR No. 940/10 (LR No. 173/1) and IR No. 15988 (LR No. 9918/4).
5. The Petitioner also stated that ILRI has been using the aforesaid parcels for research and related activities. Further that in November 2016, they learnt of the existence of a purported allotment letter



dated 23<sup>rd</sup> August 1994 in favour of New Konza Ranch Association in respect of a purported allocation of 4,047 Hectares in respect of a portion of L.R. No. 7374/4, which parcel belonged to the Petitioner (hereinafter referred to as the suit property).

6. The Petitioner also learnt that pursuant to the aforesaid letter of allotment, the Department of Survey allegedly conducted a survey over the suit property and illegally created LR No. 7374/5. That subsequently the Petitioner's officers came across another allotment letter dated 5<sup>th</sup> July 2010 and also an application letter dated 21<sup>st</sup> August 2009 by the 4<sup>th</sup> Respondent applying for allocation of the suit property.
7. It was maintained by the Petitioner that they were never consulted before their property was allegedly allocated and that there is no power to allocate land which is already alienated and a title issued. The Petitioner contended that the purported allotment of the suit property is unconstitutional as it violates the Petitioner's right to protection of property guaranteed by Article 40 of *the Constitution*.
8. The Petitioner took the position that even where there is compulsory acquisition by the Government of Kenya there ought to be due process as provided for in law and failure to comply is in violation of Article 47 of *the Constitution*.
9. By way of defence dated 9<sup>th</sup> June 2017, in ELC Case No. 52 of 2017, the Petitioner reiterated that they were the registered owner of all those properties known as IR. No. 5114(LR No. 7374/4) IR No 10055/1 (LR No. 8332) and IR No. 940/10 (LR No. 173/1) and IR No. 15988 (LR No. 9918/4). The Petitioner further contended that a letter of allotment does not constitute title to property and that in any event, the Government of Kenya has no power to allocate land which has already been alienated and to which a title/grant has been issued.
10. The Petitioner further in defence stated that if any payments was made by the 4<sup>th</sup> Respondent, then the same cannot confer any legal or proprietary rights on them and that any sub-divisions by the 4<sup>th</sup> Respondent do not confer any proprietary interest to them.
11. It was stated by the Petitioner that they did evict persons who were trespassing on its property. They stated that the suit filed by the 4<sup>th</sup> Respondent was an abuse of the due process. Accompanying the defence was a witness statement of Simon Kibiru, the Farm Manager of Kapiti Plains Estate, which reiterated, word for word the contents of his supporting affidavit sworn on 28<sup>th</sup> February 2017 in support of the Petition herein.

### **The 4<sup>th</sup> Respondent's Case**

12. The 4<sup>th</sup> Respondent filed a replying affidavit, sworn on 12<sup>th</sup> April 2017 in response to the Petition, as well as a plaint dated 16<sup>th</sup> February 2017 in respect of ELC Case No. 52 of 2017. In their replying affidavit sworn by the 4<sup>th</sup> Respondent's Chairman one Muthiani Mwangangi, the 4<sup>th</sup> Respondent stated that the Petition is bad in law, incompetent, an abuse of the court process, unmeritorious and full of falsehoods and misleading.
13. It was the 4<sup>th</sup> Respondent's case that the 4<sup>th</sup> Respondent consists of more than 6,000 persons who were properly allocated land by the Government of Kenya, being land known as Uns. Agricultural Plot No. "A" Konza Machakos, after a successful allocation. They maintained that the suit property was a parcel of land where local people who were the Respondents' forefathers were chased away by white settlers who took up cattle farming. The 4<sup>th</sup> Respondent stated that after independence, the land was reclaimed from the white settlers. They stated that the allotment of the suit property is demonstrated by the Survey Map which was initially LR No. 7374/2. They denied knowing Konza Block 7374/5 and stated



that the same is not theirs. They emphasised that they have no claim over LR No. 5114 (LR 7374/4) LR No. 10055/1 (LR No. 8332) IR 940/10 (LR No. 7731/1) and IR No. 15988 (LR 9918/4).

14. In the plaint dated 16<sup>th</sup> February 2017 and the reply to defence dated 20<sup>th</sup> June 2017, the 4<sup>th</sup> Respondent (the Plaintiff in Machakos ELC No. 52 of 2017) stated that they were the registered trustees of New Konza Ranch Association and had filed suit on their own behalf and on behalf of the 6527 members of the Ranch. They further stated that they were the rightful owner of all that piece of land otherwise known as Uns-Agricultural Plot No. "A" Konza Machakos, formerly used as a Research Centre by the Government and measuring approximately 9340 Hectares which later the Government allocated to them.
15. It was the 4<sup>th</sup> Respondent's position that on 21<sup>st</sup> August 2009, they applied to the Government of Kenya for allocation for settlement of its members who were squatters on the suit property. Further that on 9<sup>th</sup> June 2010, their application for allocation was approved and were issued with an allotment letter dated 9<sup>th</sup> June 2010 in respect thereto and asked to pay stand premiums, which they paid.
16. They maintained that when they wanted to subdivide the suit property among its members, the Petitioner unlawfully used Police Officers to stop them. Further that upon expiry of the lease of the suit property to the Petitioners, the directors of ILRI left the country and that it is only their workers who are trying to sell the land. According to the 4<sup>th</sup> Respondent, the Petitioner's lease having expired, the suit property reverted to the state, and the state acquired fresh mandate to allocate the same.
17. Consequently, the 4<sup>th</sup> Respondent sought the following orders as against the Petitioner;
  - a. An order of permanent injunction restraining the Defendants whether by itself, its agents, servants or persons acting under their authority or behalf from entering upon or otherwise interfering with the Plaintiff's quiet use and occupation of plot otherwise known as Uns-Agricultural Plot No. "A" Konza Machakos.
  - b. A declaration that parcel of land otherwise known as unsurveyed Agricultural plot No. "A" Konza Machakos rightfully owned by the Plaintiff and a consequential order of eviction and demolition issued against the Defendant whether by itself, its agents, servants or persons claiming on their behalf from the said parcel of land.
  - c. Costs of the suit.
  - d. Any other or further relief as this Honourable Court may deem fit and proper to grant.
18. Annexed to the plaint was a witness statement signed by Muthiani Mwangangi, the 4<sup>th</sup> Respondent's Chairman, which statement reiterated the averments in the plaint. In addition, the 4<sup>th</sup> Respondent, also filed a list of documents which included their certificate of registration indicating that they were registered as a society on 28<sup>th</sup> September 2010, their application letter to the Ministry of Lands dated 21<sup>st</sup> August 2009, a letter dated 9<sup>th</sup> June 2010 allegedly by one Mochoge N.O for the Commissioner of Lands referring to their letter of 28<sup>th</sup> May 2010 and an allotment letter dated 5<sup>th</sup> July 2010.

### **The Attorney General's Case**

19. The Attorney General filed a Notice of Appointment of Advocates dated 14<sup>th</sup> August 2017, effectively coming on record for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. On behalf of the 1<sup>st</sup> Respondent; one Gordon Ochieng a Senior Assistant Director, Lands Administrator, swore an affidavit dated 9<sup>th</sup> July 2019 in response to the Petition. He deponed that he had been shown a letter of allotment reference 30197/IX dated 5<sup>th</sup> July 2010 purportedly issued to the five officials of the Respondents named in the Petition for Uns-Agricultural Land measuring 9,340 Hectares, purportedly signed by one E. K. Kosgei for the



Commissioner of Lands. He attached a letter by the said E. K. Kosgei where the latter denied authoring the allotment letter dated 5<sup>th</sup> July 2010.

20. It was his averment that the said allotment letter did not originate from the Ministry of Lands and Physical Planning and that the Ministry could not purport to issue a letter of allotment in respect of private land. He maintained that the letter of allotment dated 5<sup>th</sup> July 2010 was therefore a forgery.
21. Although duly served, the 2<sup>nd</sup> Respondent did not enter appearance or file response to the Petition.
22. Subsequently, the two consolidated suits proceeded by way of written submissions, pursuant to the orders of the court made on 11<sup>th</sup> December 2018. On record are the Petitioner's submissions filed on 24<sup>th</sup> October 2022 and the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's submissions filed on 31<sup>st</sup> May 2022. No submissions were filed by the 4<sup>th</sup> Respondent.

### Submissions

23. The Petitioner submitted that indefeasibility of title is guaranteed by statute and that a duly registered title is conclusive proof of ownership. Counsel for the Petitioner referred to Section 23(1) of the Registration of Titles Act (repealed) and Section 26(1) of the *Land Registration Act* 2012 to argue that sanctity of title is protected in law and that as the Petitioner being the registered proprietor of the suit property, their title is protected under the law.
24. Reliance was placed on the case of Kenya Airways Limited vs. Japhet Noti Charo Shutu [2019] eKLR, for the proposition that registration of title guarantees indefeasibility of all rights and interests of the title holder against the entire world.
25. Counsel argued that as the Petitioner had shown conclusive proof of ownership of the suit property by way of title, they were entitled to the protection of their right to property under Article 40(3) of *the Constitution* of Kenya 2010. It was further contended that the right to own and enjoy property is protected under *the Constitution* and that right cannot be denied without good reason and just compensation. To buttress that argument, the court was referred to the case of Henry Wambega & 733 Others vs. Attorney General & 9 Others [2020] eKLR. Counsel pointed out that from the replying affidavit of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent, it was clear that the allotment letter relied upon by the 4<sup>th</sup> Respondent was a forgery and therefore that was not good reason to deprive the Petitioner of their property.
26. On the legality of the allotment letters, counsel submitted that the allotment letters dated 23<sup>rd</sup> August 1994 and 5<sup>th</sup> July 2010 in so far as they relate to the suit property were ultra vires *the Constitution* of Kenya and in excess of the power vested upon the Commissioner of Lands or any other officer or person in allocating land and therefore null and void. Counsel relied on Article 2(2) of *the Constitution* that bars any person from exercising state authority except as authorised by *the Constitution*. It was the Petitioner's position that the subdivision and allotment of the suit property were illegal and irregular as the Commissioner of Lands exceeded his power in allocating land that had already been alienated and title issued.
27. Counsel relied on the case of Sidcup Enterprises Limited vs. John Sewera Kaurai & 2 Others [2017] eKLR for the proposition that the Commissioner of Lands can only allocate unalienated Government land, unless the earlier allocation had been nullified. Counsel took the position that as long as the Petitioner held title to the suit property the same had already been alienated and was not available for allocation to any other person. Therefore, that the issuance of the impugned letters of allotment was ultra vires *the Constitution*.



28. On whether the purported allocation of the suit property violated the Petitioner's rights granted under Article 47 of *the Constitution*, the Petitioner's counsel argued that the action by the Commissioner of Lands in purporting to allocate the suit property to the 4<sup>th</sup> Respondent and the actions by the Director of Survey in surveying the same pursuant to the alleged allocation, without informing the Petitioner and without allowing the Petitioner opportunity to give their views, violated their rights to fair administrative action under Article 47 of *the Constitution* as well as Section 5 of the *fair Administrative Action Act*.
29. On their part, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' counsel submitted that Section 23 of the Registration of Titles Act (repealed) provided that a party holding title is the indefeasible owner of the property whose rights are protected in law. Counsel argued that the letter of allotment relied upon by the 4<sup>th</sup> Respondent was forged and therefore the 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not violate the rights of the Petitioner as the letter of allotment purportedly written by E. K. Kosgei was forged.
30. Counsel argued that Section 3(a) of the Government Lands Act Cap 280 (repealed) only allowed the Commissioner of Lands to allocate unalienated Government land. It was emphasised for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents that E. K. Kosgei the Director Land Administration wrote a letter ref: ADM/353/IV marked as G001 where he stated that he was not the one who signed the letter of allotment relied upon by the 4<sup>th</sup> Respondent.
31. The court was referred to the case of Syedna Mohammed Burhannuddin Saheb & 2 Others vs Benja Properties Ltd & 2 Others [2007] eKLR, for the proposition that privately owned land is not Government land and cannot be available for alienation. Besides, counsel argued that as the allotment letter relied on by the 4<sup>th</sup> Respondent was a forgery, that could not pass any rights to the 4<sup>th</sup> Respondent. In that respect, counsel referred to the case of Joseph N. K. Arap Ng'ok vs. Moijjo Ole Keiwua & 4 Others [1997] eKLR.
32. Relying on the cases of Stephen Mburu & 4 Others vs. Comat Merchants Ltd & Another [2012] eKLR and Mbau Saw Mills Ltd vs. Attorney General (for and on behalf of the Commissioner of Lands) & 2 Others [2014] eKLR, counsel contended that a letter of allotment does not confer any property rights as the same is merely an offer to take property. Counsel therefore submitted that the Petitioner's title has not been challenged in any court and the allotment relied on is forged, that therefore that 4<sup>th</sup> Respondent had no right to the suit property.

### **Analysis and Determination**

33. I have carefully considered the Petition, supporting and supplementary affidavits, responses thereto, the pleading in ELC 52 of 2017, the witness statements, all documents and annexures produced as evidence and the submissions. The issues that arise for determination are;
  - a. Whether the Petitioner is the registered proprietor of the suit property.
  - b. Whether the Respondents violated the Petitioner's rights.
  - c. Whether the 4<sup>th</sup> Respondent had proved their claim against the Petitioner.
34. The Petitioner's claim is framed in a Constitution Petition. It is therefore upon the Petitioner to demonstrate with precision that the Respondents have committed acts which amounted to violation or a threat to violate their rights. If the violation is of statutory provisions only, then such violations need not be framed as a Constitutional Petition. In this mater, the Petitioner alleged that their right to property under Article 40 of *the Constitution* was violated by the Respondents as the 2<sup>nd</sup> Respondent purported to allocate land owned by the Petitioner to the 4<sup>th</sup> Respondent while the 3<sup>rd</sup> Respondent



- purported to conduct survey of the suit property pursuant to the purported allocation. The Petitioner complained that they were never informed of the alleged unlawful allocation of their land and were not given an opportunity to give their views which is contrary to Article 47 of *the Constitution*.
35. The Petitioner having with specificity spelt out the acts complained of and the relevant provisions of *the Constitution* that were allegedly violated, in my considered view, their claim has met the threshold for being framed as a Constitutional Petition. (See Anarita Karimi Njeru vs. Republic [1979] eKLR.)
36. On whether the Petitioner is the registered proprietor of the suit property, I note that the Petitioner provided a grant registered in their name for parcel number I.R. 10055 which was for 954 years with effect from 1<sup>st</sup> June 1953. They also produced certificate of Title for I.R. No. 940 for 999 years with effect from 1<sup>st</sup> June 1924 registered in their name, certificate title for I.R. 8680 for 999 years with effect from 1<sup>st</sup> March 1924, Certificate of title for I.R No. 5114 for 999 years with effect from 1<sup>st</sup> February 1959, Transfer for L.R. No. 9918/4 Konza, a letter of consent dated 25<sup>th</sup> May 1967 for L.R. No. 9918/4, lease for I.R No. 15986, and title for I.R 5114. I am therefore satisfied that the Petitioner has shown that they are the registered proprietor of the suit property.
37. As the Petitioner produced a title for IR No. 5114 for LR No. 7374, which is a lease of 999 years from 1<sup>st</sup> February 1959 having been registered under the Registration of Titles Act (Cap 281) (Repealed), in my view, that is sufficient proof that the Petitioner was the registered proprietor of the suit property.
38. Section 23(1) of the Registration of Titles Act (repealed) provided for indefeasibility of title for a title holder as follows;
- “The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proven to be a party.”
39. The import of Section 23(1) of the Registration of Titles Act (repealed) was immortalized in Section 26(1) of the *Land Registration Act* 2012, which provides as follows;
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.
40. It is therefore clear that a certificate of title demonstrates indefeasibility of the title to the holder thereof and the same shall only be challenged on grounds that it was acquired through fraud, illegality, lack of procedure or corruption.
41. Having considered the pleadings, I note that the 4<sup>th</sup> Respondent has not raised any challenge on the Petitioner’s title on grounds of fraud, illegality, or want of procedure or on grounds of corruption or on any other ground. Indeed, they confirm that the suit property was leased by the Government of



Kenya to the Petitioner, but they contend that the lease expired, albeit with no evidence of the expiry. It is therefore the finding of this court that the Petitioner is the registered proprietor of the suit property and the absolute and indefeasible owner thereof.

42. On whether the Petitioner's rights were violated by the Respondents, the Petitioner's case is that the 2<sup>nd</sup> Respondent's predecessor, by letters of allotment dated 23<sup>rd</sup> August 1994 and 5<sup>th</sup> July 2010, purported to allocate the suit property to the 4<sup>th</sup> Respondent while the same was private property owned by the Petitioner. The Petitioner further stated that pursuant to the aforesaid illegal allotment letters, the Department of Survey purported to Survey the suit property and issued the 4<sup>th</sup> Respondent with a title and deed plan by illegally creating L.R. No. 7374/5 from the suit property. Their core complaint being that the Commissioner of Lands had no power under *the Constitution* to allocate alienated private property and that the allocation was done without granting the Petitioners notice or opportunity to give their views.
43. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents by way of response to the Petition, distanced themselves from the allotment letter dated 5<sup>th</sup> July 2010 terming it a forgery. Even the person said to have purportedly written the same, being one E. K. Kosgei, disowned the allotment letter and denied having authored the same. While the Petitioner referred to two allotment letters, the only allotment letter relied upon by the 4<sup>th</sup> Respondent was that of 5<sup>th</sup> July 2010.
44. Having perused the allotment letter of 5<sup>th</sup> July 2010 relied upon by the 4<sup>th</sup> Respondent, I note that the plot allegedly allocated is described as Uns. Agricultural Plot No. "a" – Konza Machakos. It is said to be measuring 9340 Hectares with a stand premium of Kshs. 12 Million. The 4<sup>th</sup> Respondent attached a letter dated 21<sup>st</sup> August 2009, purportedly being an application to the Ministry of Lands, for the allocation of said parcel. I agree with the submissions of the Petitioner that alienated or private land is not available for allocation. The Commissioner had no powers under *the Constitution* or any other written law to allocate private or public land which had already been allocated or reserved for a particular public purpose, as the case may be.
45. Section 3(a) of the Government Lands Act Cap 280 (repealed) provided as follows;
3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may;
- (a) Subject to any other written law, make grants or dispositions of any estates, interests or rights in or over alienated Government land;
46. Therefore, the President could only allocate unalienated Government land. Section 2 of the Government *Land Act* (repealed) described unalienated land as follows;
- “unalienated Government land means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.
- The same definition for “unalienated Government land” was adopted in Section 3 of the Physical Planning Act (Cap 286 (repealed)). That provision also excluded land reserved for public purposes by the Commissioner as not being unalienated Government land.
47. While Section 3 of the Government Lands Act (repealed) gave the President of Kenya the power to allocate unalienated Government land, Section 7 of the said Act allowed the President to delegate some of his functions to the Commissioner of Lands. However, the power to allocate unalienated Government land was not delegated to the Commissioner of Lands.



48. In the case of James Joram Nyaga & Another vs. The Hon. Attorney General & Another [2007] eKLR, while addressing Sections 3 and 7 of the Government Lands Act (repealed), the court stated as follows;
- “the above Section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the provision to the Section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18<sup>th</sup> December 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Land Acts Cap 280 Laws of Kenya nor could he pass any registrable title under the Registration of Titles Act Cap 281 Laws of Kenya.”
49. Therefore, the issues herein are whether the Petitioner’s title in LR No. 7374/4 was available for allocation and whether the Commissioner of Lands had power to allocate unalienated Government land. As pointed out earlier, the provision to Sections 3 and 7 of the Government Lands Act Cap 281 (repealed) provides that the power to allocate unalienated Government land was vested in the President of the Republic of Kenya and that power could not be delegated to the Commissioner of Lands. Having considered the letter of allotment dated 5<sup>th</sup> July 2010, I note that the same was purportedly signed and issued by the Commissioner of Land. Therefore, in view of the law stated above, the Commissioner had no power to allocate land, hence any such allocation, was nothing but ultra vires the clear statutory provisions.
50. In addition, the suit property being private property owned by the Petitioner who are a public company, was not available for allocation. It had already been registered in the Petitioner’s name, the earlier allocation to the Petitioner which led to the issuance of the certificate of title to the Petitioner was neither challenged nor revoked. There cannot be more than one allocation for any land. I therefore find that the suit property was not available for allocation.
51. The 4<sup>th</sup> Respondent pleaded that the Petitioner’s lease had expired and that the Petitioner’s directors who were not citizens had left the country. No evidence was tendered towards this proposition. I have however considered the certificate of title for the suit property produced by the Petitioner. The same is leasehold for 999 years from 1<sup>st</sup> February 1939. The same shows that the lease was to run upto 2938. Therefore, the 4<sup>th</sup> Respondent’s argument is not correct because even if they were to demonstrate that the Petitioner is a non-citizen, under Article 65 of *the Constitution*, any lease held by non-citizens for more than 99 years would be deemed to be 99 years with effect from 27<sup>th</sup> August 2010. Therefore, the lease held by the Petitioner cannot be said to have expired in any event.
52. On whether the 4<sup>th</sup> Respondent is entitled to the prayers sought in the plaint, I note that the 4<sup>th</sup> Respondent’s claim is based on a letter of allotment dated 5<sup>th</sup> July 2010. That letter of allotment was purportedly signed by one E. K. Kosgei, for the Commissioner of Lands. As earlier discussed in this judgment, Section 3 and 7 of the Government Lands Act (repealed) did not allow delegation of the Presidents power to allocate land. In addition, a letter of allotment even if procedurally issued is merely an offer and cannot confer proprietary interest. Under Section 3 of the Act, therefore the allocation was ultra vires. Besides, the land that is described in the purported allotment letter as “Uns. Agricultural Polot No. “A”, was in fact LR No 7373/4 belonging to and registered in the names of the Petitioner and was therefore not available for allotment. And more importantly the allotment letter has been described by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as being a forgery with the person who purportedly signed the same denying having signed it.



53. Article 40(1) and (6) of *the Constitution* does not protect the right to property acquired through an illegality. The same provides as follows;

- “ 40 Subject to Article 64 every person has the right either individually or in  
(1) association with others, to acquire and own property –
- a. Of any description; and
  - b. In any part of Kenya
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

54. The 4<sup>th</sup> Respondent having forged the allotment letter cannot obtain Constitutional or legal protection for the forgery as that is a criminal offence. As the 4<sup>th</sup> Respondent’s claim is predicated upon an illegality, the same cannot be upheld by the law or this court.

55. The upshot of the above is that the 4<sup>th</sup> Respondent’s claim is dismissed in its entirety with costs to the Petitioner and the Petitioner’s claim is allowed as prayed and judgment is entered for the Petitioner as follows;

- a. A declaration be and is hereby made that the letter of allotment dated 23rd August 1994, ref. no. 12614/III/122; Konza Block 7374/5 – Machakos and addressed to New Konza Ranch Association was and is ultra vires of *the Constitution* of Kenya (repealed) and Constitution of Kenya 2010, and also in excess of power vested upon the Commissioner of Lands or any other officer or person in allocating land and is therefore null and void.
- b. A declaration be and is hereby made that the letter of allotment dated 5th July 2010, ref. no. 30197/IX; uns. Agricultural Plot ‘A’ – Konza Machakos in so far as it relates to any of the properties listed in the Petition as belonging to the Petitioner is ultra vires of *the Constitution* of Kenya (repealed) and Constitution of Kenya 2010, and also in excess of power vested upon the Commissioner of Lands or any other officer or person in allocating land and therefore null and void.
- c. A declaration be and is hereby made that any allocation of any of the Petitioner’s properties or portions of them; vis. I.R. 5114 (L.R. No. 7374/4); I.R. No. 10055/1 (L.R. No. 8332); I.R. No. 940 (L.R. No. 1731/1) and I.R. No. 15988 (L.R. No. 9918/4) is a violation of the Petitioner’s rights as enshrined under Article 40 of *the Constitution* of Kenya 2010.
- d. A declaration be and is hereby made that any allocation or alienation of any of the Petitioner’s property without due process is a violation of the Petitioner’s right to a fair administrative process as enshrined under Article 47 of *the Constitution* of Kenya 2010.
- e. A conservatory order be and is hereby issued restraining any person claiming interest through the purported allocation of any portion the Petitioner’s land, whether by themselves, by agent(s), servant(s) or by any other description from entering into or in any manner occupying any of the Petitioner’s properties; viz. I.R. 5114 (L.R. No. 7374/4); I.R. No. 10055/1 (L.R. No. 8332); I.R. No. 940 (L.R. No. 1731/1) and I.R. No. 15988 (L.R. No. 9918/4).
- f. The costs of the suit shall be borne by the 4<sup>th</sup> Respondent.

56. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25<sup>TH</sup> DAY OF  
JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms. Kadima for the Petitioner

No appearance for the Respondent

Josephine – Court Assistant

