



**Maitha v Cabinet Secretary Industry Trade and Enterprises Development & 2 others  
(Environment & Land Petition 2 of 2021) [2023] KEELC 80 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 80 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 2 OF 2021  
MAO ODENY, J  
JANUARY 20, 2023**

**BETWEEN**

**PATRICK BAYA MAITHA ..... PETITIONER**

**AND**

**CABINET SECRETARY INDUSTRY TRADE AND ENTERPRISES  
DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT  
MICRO AND SMALL ENTERPRISES AUTHORITY ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By a Petition dated February 8, 2021, the Petitioner herein moved this Honourable Court seeking orders: -
  - a. An injunction restraining the Respondents their servants, agents, hirelings or whosoever acting under their instructions from continuing with construction/development and or from interfering with the applicant's peaceful enjoyment and use of the suit plots.
  - b. A declaration that the Petitioner's plots of land being Kaloleni/Vishakani/1010, Kaloleni/Vishakani/1011 and Kaloleni/Vishakani/1012 belong to the Petitioner absolutely.
  - c. A declaration that the Petitioner's rights under Article 40 of the [\*Constitution of Kenya, 2010\*](#) relating to the protection of the right to property have been violated by the Respondents.
  - d. Interest on d above a court rate.
  - e. Costs of the Petition be awarded to the Petitioner.



### **Petitioner's Case**

2. The Petition was supported by the Petitioner's affidavit sworn on February 8, 2021 where he deponed that he is the registered proprietor and occupant of land parcels Kaloleni/Vishakani/1010, Kaloleni/Vishakani/1011 and Kaloleni/Vishakani/1012 measuring approximately 0.17Ha, 0.18Ha and 0.18Ha respectively and that the Respondents without any authority invaded the suit properties and erected structures despite the Petitioner's intervention to stop their actions.

### **Respondents' case**

3. The Respondents filed grounds of opposition dated May 25, 2021 and a notice of Preliminary Objection which was dismissed by this Court on December 1, 2021. According to the Respondents, the suit properties, originally Kaloleni/Vishakani/266, was set aside for public use, specifically the development of a Constituency Industrial Development Centre.
4. The Respondent further stated that the Petitioner illegally subdivided the original land and obtained title deeds to the suit properties and that the Petitioner neither demonstrated allocation of the original land to one Joseph Maitha Masha, nor violation of his rights by the Respondent.
5. It was the Respondent's case that following the Government's determination to empower its citizens and for purposes of spurring economic growth, it established the Micro and Small Enterprises Authority with a view to identify and initiate programmes to achieve this goal.
6. Further that the Ministry of Industrialization through the District Industrial Development Officer Malindi who wrote to the Town Clerk, County Council of Kaloleni on the November 2, 2009 requesting the council to allocate land for purposes of constructing Jua Kali shades.
7. The Respondent stated that the Council through various meetings allocated land to the project which the Ministry went ahead to construct the Jua Kali sheds which are fully occupied by small traders.
8. Counsel agreed to canvas the Petition vide written submissions which were duly filed.

### **Petitioner's Submissions**

9. Counsel for the Petitioner identified three issues for determination, namely: -
  - a. Whether Plot Nos Kaloleni/Vishakani/1010, Kaloleni/Vishakani/1011 and Kaloleni/Vishakani/1012 are public land;
  - b. Whether Plot Nos Kaloleni/Vishakani/1010, Kaloleni /Vishakani/1011 and Kaloleni/Vishakani/1012 belong to the Petitioner;
  - c. Whether the Petitioner's right to acquire and own property as stipulated under Article 40 of the [Constitution of Kenya, 2010](#) has been infringed upon by the respondents.
10. On the issue as to whether the suit land is public land, counsel relied on the definition of public land as stipulated under Article 62 (1) of the [Constitution](#) and submitted that any private or community owned land cannot be considered to be public land as was the case in the suit properties registered in his name.
11. Counsel further submitted that the suit property in this Petition is registered in the name of the Petitioner making the said property private land as provided for under Article 64 of the [Constitution of Kenya, 2010](#) where it defines Private land to include any registered land held by any person under any freehold or leasehold tenure.



12. On the issue whether the suit properties belong to the Petitioner, counsel submitted that the Petitioner having obtained the suit properties through a legal and procedural manner upon obtaining a certificate of confirmation of grant for the estate of Joseph Maitha Masha, the registration is prima facie evidence that he is the absolute owner of the suit properties as envisaged under section 24 (a) and 26 of the [Land Registration Act, 2012](#).
13. On the issue whether the Petitioner's rights under Article 40 of the [Constitution](#) has been violated by the Respondents, counsel.
14. Counsel submitted that the Respondent's continued trespass has infringed on the Petitioner's right to own property as envisaged under Article 40 of the [Constitution](#). Further that the Respondent did not file any documentation to prove that the land was allocated legally to them.

### **Respondents' Submissions**

15. Counsel for the Respondents identified two issues for determination namely: whether the Respondents were allocated the suit land by the Kaloleni County Council and whether the orders sought can be issued.
16. On the first issue as to whether the Respondents were allocated to the Respondents, counsel submitted that the properties were originally donated and allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by the Kaloleni Town council in the year 2009 for a justifiable cause and approvals by the relevant government institutions issued.
17. Counsel further submitted that by virtue of Section 16 of the [Government Proceedings Act](#), no order of injunction can issue against the government and that the Petitioner has failed to discharge his duty under Section 107, 108 and 109 of the [Evidence Act](#) therefore not entitled to the orders sought.

### **Analysis and Determination**

18. The issues for determination in this case are whether the Petitioner is the rightful owner of the suit properties, whether the suit properties are public land, and whether the Petitioner's rights under Article 40 have been violated and the orders to be granted.
19. Article 40 of the [Constitution of Kenya, 2010](#) which is the basis of the present petition provides that: -

"Protection of right to property

- (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; and
  - (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."

20. The Petitioners has described precisely how his rights were infringed by the Respondents under Article 40 of the [Constitution](#) herein and attached photographs of the construction that is ongoing on the suit properties.

21. The Petitioner has also annexed copies of title deeds of the suit properties that are registered in his name which is prima facie evidence that the suit properties belong to him. There was no evidence to show that they were either acquired fraudulently or vide unprocedural means.

22. Section 26 of the [Land Registration Act, 2012](#) further 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.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."



23. It should be noted that the Respondent only filed grounds of opposition to the Petition and a notice of Preliminary Objection without filing any affidavit or documents to support the allegation that the land had been donated by the Kaloleni Town Council for public use. The evidence was from the bar without authentication of what the Respondent alleged. There are laid down procedures of acquisition of private land to public use through compulsory acquisition and prompt payment of the owner of the land.
24. The Respondents' argument that the suit properties are public land and that the Petitioner's ownership is fraudulent is baseless as it is not anchored on any evidence of the fraudulent transaction. The copies of title deed attached to the Petitioner's supporting affidavit are in the absence of any other cogent evidence, conclusive proof of ownership as stipulated under Section 26 of the [Land Registration Act](#) above.
25. The Petitioner demonstrated how he acquired the suit properties and I find no reason to doubt his evidence. In any case, the Respondents did not produce any evidence to the contrary.
26. The government can legally acquire private land for public use but compensation must be made to the owner of the land. In this case there is no evidence that the government acquired this land or that there was any compensation given to the Petitioner to surrender the suit parcels of land.
27. On whether the Petitioner's rights under Article 40 above have been violated, it is a well settled principle that the Petitioner in such a constitutional Petition ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation (See [Anarita Karimi Njeru v Republic](#) [1979] KLR 154 and [Trusted Society of Human Rights Alliance v Attorney General and Others](#) Petition No 229 of 2012).
28. As already established, the Petitioner has a claim over the suit properties being the registered owner of the same. The Respondents did not also deny being in occupation of the suit properties. It is evident from the evidence on record that Respondents have and continue to violate the Petitioner's right under Article 40 of the [Constitution](#).
29. The Respondents argued that their use and occupation of the suit parcels has been vivid notorious and uninterrupted until 2021. This argument is strange as it seems counsel is claiming that the Respondents have acquired the suit parcels by way of adverse possession. The question is whether government or its departments can acquire land by adverse possession?
30. Section 41 of the [Limitation of Actions Act](#) exempt government from the operation of adverse possession doctrine as follows:

"However, Section 41 of cap 22 provides as follows-

This Act does not -

- (a) enable a person to acquire any title to, or any easement over -
  - (i) Government land or land otherwise enjoyed by the Government;
  - (ii) mines or minerals as defined in the Mining Act;
  - (iii) mineral oil as defined in the Mineral Oil Act;
  - (iv) water vested in the Government by the Water Act;
  - (v) land vested in the county council (other than land vested in it by section 120 (8) of the Registered Land Act); or



- (vi) land vested in the trustees of the National Parks of Kenya; or
- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act or any Act repelled by the Act."

31. It follows that the government can also not acquire land by way of adverse possession but through compulsory acquisition and prompt compensation.
32. The Petitioner sought an injunction against the Respondents which the Respondents' submitted that by virtue of Section 16 of the *Government Proceedings Act* prohibits the issuance of injunctive orders against the Government and as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are government institutions, no injunction should issue. I agree with the Respondents' argument however, pursuant to Article 23 of the *Constitution of Kenya*, injunctive orders can nowadays be issued against the government where threats to fundamental rights are alleged by a subject. Moreover, Section 16 of the *Government Proceedings Act* permits the court to issue declaratory orders in lieu of the injunction prayed for.
33. The aforementioned provisions read as follows: -

"Article 23;

Authority of courts to uphold and enforce the Bill of Rights

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (1) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
  - a. a declaration of rights;
  - b. an injunction;
  - c. a conservatory order;
  - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - e. an order for compensation; and
  - f. an order of judicial review.

Section 16 of the *Government Proceedings Act*;

16. "Nature of relief

1. In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power



to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that—

- i. where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
  - ii. in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.
2. The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government."

34. I have considered the Petition the Supporting Affidavit and the submission by counsel and find that the Petitioner has proved his case against the Respondents and make the following orders: -

- a. A declaration be and is hereby issued that the Petitioner is entitled to the suit properties as the registered owner thereof.
- b. A declaration be and is hereby issued that the Petitioner's rights under Article 40 of the [Constitution of Kenya, 2010](#) have been violated by the Respondents.
- c. Costs to the Petitioner.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**

.....  
**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

