



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC PETITION NO. 22 OF 2017

(FORMALLY NKU HIGH COURT PETITION No. 68/2014)

IN THE MATTER OF ARTICLES 22(1), 40, 42, 47, 69

and 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION TO RIGHTS

TO CLEAN AND HEALTHY ENVIRONMENT

BETWEEN

SAMUEL MUNIU MUGO.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF NYANDARUA.....RESPONDENT

JUDGEMENT

1. On the 24th December 2014, the Petitioner filed his Petition dated 23rd December 2014 in the Constitutional and Judicial Review Division at the Nakuru High Court,
2. On the 12th May 2015, when the matter was placed before the Hon Judge, the Respondents had not filed their response to the Petition wherein the court directed that they file the same within 21 days. The hearing set for the 30th June 2015. The matter did not proceed on the day as scheduled but on the 26th April 2016, from the court record the same was placed before Hon Odero J. sitting in the Nakuru High court who directed that same be transferred to Naivasha and be placed before the High Court in Naivasha for hearing.
3. The record is silent to whether the file was transferred to Naivasha or not but on the 13th November 2017, the matter was placed before the Environment and Land Court sitting in Nyahururu. Parties were not present and the same was re-scheduled for mention to take directions on the 31st January 2018, on which day, counsel for the parties took directions by consent to have the same disposed of by way of written submissions.

The Petitioners case.

4. The Petitioner's case is that on the 11th May 1995, the Petitioner applied to the Defunct Ol'Kalou Town council to be allocated the Mountainous, rocky and rugged stretch of land opposite Ol'Kalou District Headquarters for redemption and development into a modern forested recreational zone.
5. That the Petitioner's Application was granted and on the 29th September 2009, he was issued with an allotment letter which licensed him to utilize the area for planting tree nurseries, planting trees, general botany and public recreation purpose. The area of the land was also pointed out to him by the council surveyor.
6. It was the Petitioner's submission that he paid all the requisite charges stipulated in the allotment letter wherein in March 2010 he

embarked on the development of the said land by planting both exotic and indigenous trees together with shrubs and flowers of all varieties.

7. He added soil and manure to the area and constructed two African traditional huts as well as designed a web site known as www.olKaloubotanicalgardens which had a following of about 30,000 online guests.

8. That he even identified a dove like structure wherein the young historical Scottish explorer Joseph Thomson had stood in 1883 and slept there overnight and from where he had named the Adberdare Ranges. This discovery thus gave the botanical garden both historical significance, aesthetic and economic dimension which is currently celebrated both locally and internationally.

9. That sometime in January the year 2014, the Respondents' employees and/or agents blocked the access road to the garden on the pretext that the same would be tarmacked. The tarmacking had not been done to date. That later, the Respondent authorized quarry stone mining on the site despite the Petitioners' license for use of the land not having been revoked.

10. The said stone mining according to the Petitioner has exposed the botanical garden to environmental waste and degradation which continues at an alarming rate despite the petitioners' protests.

11. That the Respondents' act of authorizing the quarry mining on the land comprising the botanical gardens amounts to arbitrary deprivation of property without compensation and is an affront to his citizen's right to protection of the environment for the benefit of present and future generations.

12. The Petitioner thus prayed for the following reliefs:

i. A declaration that the Respondent's act of authorizing quarry mining on the land comprising the Petitioner's botanical gardens constitutes arbitrary deprivation of property without compensation and is an affront to his citizen's right to protection of the environment for the benefit of present and future generations and is thus null and void.

ii. An order of mandatory injunction do issue compelling the Respondent to stop the quarry mining taking place on the land comprising the Petitioner's botanical gardens and rehabilitate the same to its original state before destruction.

iii. General damages for trespass to property.

iv. Costs of this Petition be paid by the Respondent.

13. The grounds that:-

i. The Respondent is under a legal duty to ensure that the environment is protected for the benefit of present and future generations within its area of jurisdiction pursuant to Article 42 of the Constitution.

ii. The Respondent is not entitled to deprive the Petitioner of his lifetime investment in the botanical garden without compensation.

iii. The Petitioner is entitled to fair administrative action from the Respondent in any decision affecting his right to the botanical gardens under Article 47 of the Constitution.

iv. The Respondent's action of allowing quarry mining on the land comprising the botanical gardens is arbitrary and unconstitutional in view of Article 40 of the Constitution.

v. The Petitioner is entitled to equal protection of the law.

14. The Petitioners' submission was that even though the allocation of the suit premises was on temporary basis, yet the interest vested upon him pursuant thereto was a legal interest capable of protection under the law.

15. That there was no time frame within which the temporary allocation was to be converted into a long term lease. That the fact that his temporary allocation letter did not indicate the period in which he was to be in occupation of the suit premises was not a license for the Respondent to repossess the suit premises without adhering to due legal process.

16. The Petitioner in arguing his petition framed his issues for determination as;

i. Does the Petition disclose a legal interest capable of protection by the Honorable court?

ii. Is the Petitioner entitled to the orders sought in the Petition?

iii. Who is liable to pay costs of the suit?

17. On the first issue for determination, that the Petitioner had disclosed a legal interest capable of protection by the honorable court, he relied on the provisions of Articles 22(1), 40, 42, 47, 69 & 70 of the Constitution which Articles I shall endeavor to produce for ease of reference.

18. Article 22(1) of the Constitution provides that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened”.

19. Article 40 of the Constitution provides 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; 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. That Article 42 of the Constitution provides that:-

Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

21. Article 47(1)(2) of the Constitution provides that

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

22. Article 69(1)(a) provides as follows;

(1) The State shall—

(a) ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

23. Lastly, Article 70 of the Constitution provides for enforcement of environmental rights as follows:-

(1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;
or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

24. On the second issue as to whether the Petitioner was entitled to the orders sought in the Petition, it was his submission that all the reliefs had been set out in the Petition under Articles 23(3) and 70 of the Constitution of Kenya. That in regard to the amount of compensation, he had demonstrated the violation of his right to property, fair administrative action and to clean and healthy environment. That Article 70(3) of the Constitution provided that an Applicant did not have to demonstrate that any person had incurred loss or suffered injury. His submission was that for all the violations pleaded, a sum of Kenya Shillings Five Million (Kshs.5,000,000/=) would be adequate compensation.

25. He relied on the case of **Multiple Hauliers East Africa Limited vs. Attorney General & 10 Others (2013) eKLR** in which Lady Justice Mumbi Ngugi awarded Kshs. 2,000,000/= for violation of the Petitioners right to fair administrative action only. That in the instant case, many other rights had been violated and it was only fair and just that the compensation be of a higher amount.

26. In response to the Respondent's defence that the allocation of the suit land was merely temporary, to be confirmed by an allotment by the Commissioner of Lands which has not been effected.

27. The Petitioner's further submissions was that under Section 117(1)(c) of the old Constitution (Revised Edition 1983)the same had provided as follows:-

“subject to this section, an Act of parliament may empower a County Council to set apart an area of Trust Land vested in that County Council for use and occupation by any person or persons for a purpose which in the opinion of that County Council is likely to benefit the persons ordinarily resident in that area or any other area of Trust Land vested in that County Council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof”.

28. That Section 117 (3) of same Constitution also provided that:-

“Where a County Council has set apart an area of land in pursuance of this Section, it may, subject to any law make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart”.

29. That Section 13 (1) (c) of the Trust Land Act Cap. 288, Laws of Kenya made provisions for setting apart land by a Council in pursuance of Section 117 (1) of the Constitution. The said proviso provided as follows;

In pursuance of section 117(1) of the Constitution, a council may set apart

an area of Trust land vested in it for use and occupation—

(a)by any public body or authority for public purposes; or

(b)for the purpose of the extraction of minerals or mineral oils; or

(c)by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.

30. That in the instant suit, the Petitioner had applied to Ol'kalou Town Council for allocation of the suit land so as to convert it into a modern forested recreational Zone for the benefit of the local community. His application was discussed and approved by the standing committee on environment and the decision communicated on condition that he would *“utilize the said area for tree nurseries, plant trees, general botany and recreation purpose”*. He had complied. However, the Respondent without any notice to the Petitioner started committing the acts complained of.

31. That Section 39 of the Trust Land Act provides for forfeiture of Lease of License as follows:-

“(1) if in respect of land which is held under a Lease granted under this Act:-

(a) any rent is at any time in arrears for a period of twenty one days after it first became due or

(b) there has been any breach of any of the Lessee's covenants or

(c) The Lessee or a person deriving title under him remains in possession of the land after the expiration or other lawful determination of the lease,

32. Further that Section 39(3) (b) of the said Act provides that;

“References to Lessee's covenants are to be taken as references to conditions in the Licence”.

33. In the present case, no such notice or proceedings were issued or instituted against the Petitioner by the Respondent which omissions contravene Article 47 of the Constitution of Kenya, 2010.

34. The Petitioner relied on the Court of Appeal decision in the case of **M'ikiara M'mukanya & Another vs Gilbert Kabere M'mbijiwe (1983) eKLR**, to buttress his submissions.

The Respondent's response.

35. In opposition of the Petitioner's Petition, the Respondent's replying affidavit was to the effect that there was no interest vested in the Petitioner capable of being protected by this Honorable court and that the Petition herein was an abuse of the court process.

36. The Respondent deponed that the allocation sought to be relied upon by the Petitioner was merely a temporary allocation which was to be confirmed by an allotment by the Commissioner of Lands which allotment has never been effected to date.

37. That further to the foregoing, the Petitioner herein sought to enjoy an area which was not delineated as the temporary letter of allocation neither indicated the size nor the particular location of the parcel of land allocated in the expansive hilly and rocky areas within Ol'kalou Town. The occupation by the Petitioner was therefore not sanctioned as there was no map indicating the specific location of the said parcel allocated to him, a situation which the Petitioner took advantage of and on his own motion moved to occupy a huge portion of land adjacent to his home.

38. The Respondent further deponed that the occupation of the Petitioner was subject to condition (v) in the temporary letter of allocation which required an allottee to comply with conditions that may be imposed by relevant authorities from time to time.

39. That further, the temporary letter of allocation had not indicated the period upon which the Petitioner was to be in occupation of the parcel of land for the botanical garden thus the Respondent was at liberty to take back the suit premises.

40. It was the Respondent's argument that the Petition herein was not brought for the good of the residents of the County as the area claimed to be occupied by the botanical garden is over 5 acres with two traditional huts and the rest of it has been utilized by the Petitioner who has planted nappier grass for his own use, in breach of the purpose for which the land was temporarily allocated to him.

41. Further that the Petitioner has also infringed and/or violated other allottees right to own and use property as he has encroached on other parcels of land allocated to other persons by the defunct Town Council.

42. The Respondent deponed that it was vested with the mandate of planning in the County and as such could exercise the mandate for the benefit of the residents of the County and that Constitutional remedies should not be invoked where a remedy lies in some other legislative provision. The allegations advanced by the Petitioner were of a general nature, lacked specificity and did not meet the standard set in respect of Constitutional Petitions.

43. That further to the foregoing, the Petitioner had not established that any of his rights had been infringed by the Respondent and in particular that he had acquired any proprietary rights over the suit property wherein the Respondent could be held to have contravened pursuant to Articles 40 and 47 (1) of the Constitution.

44. That not all disputes should attract a Constitutional adjudication, in any event, a claim based on trespass would still be properly before the Environment and Land Court pursuant to Section 13 of the Environment and Land Court Act.

45. In the filed submissions, the Respondent reiterated the facts of the case before proceeding to frame their matters for determination as;

i. Whether the Petition discloses a legal interest capable of protection under the law.

ii. Whether any of the Petitioners' Constitutional rights had been infringed.

iii. Whether the supplementary affidavit allegedly filed by the Petitioner as well as the new evidence introduced in the affidavit should be admissible by the court

iv. Who is liable to pay costs of the suit?

46. On the issue as to whether the Petitioner had disclosed a legal interest capable of protection under the law, it was the Respondent's submission that although the Petitioner had submitted that the Respondent's action of authorizing a quarry mining had the suit land amounted to arbitrary deprivation of property without compensation, yet according to them deprivation could only involve interference with use, enjoyment or exploitation of private property in respect to a person having title or right to or in any property concerned. That in this case the Petitioner was only allowed to use the suit land for a period of time as was specified in the temporal letter of allotment dated 29th September 2009.

47. That an allotment letter is normally an offer issued by the Government or local authority to an applicant subject to a formal written acceptance of the conditions given and the payment of the charges prescribed therein. That failure to adhere to the requirements within 30 days of the offer being posted, the applicant stood a chance to forfeit the property.

48. The Respondent relied on the case of **Mbau Saw Mills Ltd vs. Attorney General for and on behalf of the Commissioner of the Lands & 2 Others [2014]eKLR**

49. In the present case, no formal letter of acceptance was written by the Petitioner after the issuance of the of the said temporal letter of allotment as was required by part iv of the said letter which stipulated as;

'That the allottee upon acceptance of the offer shall undertake to pay the following.....'

50. They also relied on the decided case of **Dr. Joseph N.K. Arap Ngok vs. Justice Moiyo Ole Keiwa & 4 Others Civil application No. Nairobi 60/97.**

51. They submitted that the Petitioner was merely issued with a temporary letter of allotment which was to be confirmed by a further allotment by the Commissioner of Lands upon acceptance of the offer but whose allotment has never been effected to date. There was no lease of title.

52. That further to the foregoing, the temporary letter of allotment neither indicated the size nor the particular location of the parcel of land allocated in the expansive hilly and rocky areas within Ol'kalou Town which in the ordinary circumstance would have been so indicated had the process been fully complied with.

53. On the second issue for determination as to whether any of the Petitioners' Constitutional rights had been infringed, the Respondent relied on the provisions of Article 40(3) of the Constitution which stipulated as follows:

(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...

54. That since the temporary allotment letter did not rise to proprietary interest in land, the Petitioner's claim to a right to property under Article 40 of the Constitution did not arise.

55. The Respondent also relied on Section 5(1) & (2)(c) of the County Governments Act that stipulated that:

'A county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament'

56. That schedule 4 of the Constitution lists functions of the county Government, one of them being vested with the mandate of county planning and development which includes but not limited to statics; lands survey and mapping, boundaries and fencing, housing, electricity and gas reticulation and energy regulation.

57. That the Respondent's actions of authorizing quarry mining and tarmacking of the road adjacent to the said botanical gardens were thus well within its powers and was for the benefit of all the residents of Nyandarua County.

58. The Respondent also relied on article 47 (1) & (2) (supra) to submit that although the Petitioner had had alleged that his rights had been infringed by the Respondent, yet he had not demonstrated now these rights had been infringed, there were no particulars of the alleged complaints, the manner of the infringement or the jurisdictional basis of the action before the court as was established in the case of **Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272.**

59. That the Petitioner's claims did not meet the required standard set out in respect of the Constitutional Petitions on a balance of probabilities. That since they had established that the Petitioner had no interest or right in the suit property, he could not claim violation of a right not vested in him nor invoke constitutional adjudication.

60. That indeed what was on the ground is that the Petitioner had instead infringed on other people's rights to own and use property as he had encroached on parcels of land allocated to other persons. That the area claimed to be occupied by the botanical garden was over 5 acres with two traditional huts and napier grass planted by the petitioner for his own use in breach of the purpose for which the land was temporary

allocated to him. The petitioner cannot pursue Constitutional adjudication when he himself infringed and/or violated other allottees' constitutional right to own and use property. This is in harmony with the principle of **Ex Turpi Causa non oritur actio**.

61. On the issue as to whether the supplementary affidavit allegedly filed by the Petitioner as well as the new evidence introduced in the affidavit should be admissible by the court, it was the Respondent's submission that the Petitioner's submissions were partially based on a supplementary affidavit filed on the 21st February 2018 introducing new evidence and which was not served upon them.

62. The Respondent's submission was that the object of pleadings was to give each party fair and proper notice of their opponents' case to enable them frame and prepare their case so as to avoid taking the other party by surprise. That it was clear from the Petitioner's conduct that they intended to ambush the Respondents by quoting the said affidavit in their submissions knowing very well that the same had not been served upon them. The Respondents sought for the said supplementary affidavit to be expunged from the court record.

63. Both parties submitted that the rival party should pay for the cost of the Petition.

64. I have carefully considered the content of the Petitioner's Petition as well as the supporting affidavit. I have also considered the Respondent's replying affidavit and the submissions of both Counsel as well as the relevant provisions of the law and Authorities herein cited. I find the issues arising for determination are as follows:-

- i. Whether the stone mining activity has exposed the botanical garden to environmental waste and degradation
- ii. Whether the Petition discloses a legal interest capable of protection under the law.
- iii. Whether any of the Petitioners' Constitutional rights had been infringed.
- iv. Whether the Petitioner is entitled to the orders sought in the Petition?

65. From the pleadings and documents filed in this suit, it is clear that the Petitioner is challenging the activities of the Respondent on among other grounds, that they are harmful to the environment. The Petitioner also contends that the Respondent's activities are unlawful.

66. The Petitioner's case is that after he had been issued with an allotment letter licensing him to utilize the suit area for planting tree nurseries, trees, general botany and public recreation purpose, he paid all the requisite charges stipulated in the allotment letter wherein in March 2010 and embarked on the development of the said land by adding soil and manure to the area hereby planting both exotic and indigenous trees together with shrubs and flowers of all varieties.

67. That sometime in January the year 2014, the Respondent's employees and/or agents had blocked the access road to the garden on the pretext that the same would be tarmacked but instead, authorized quarry stone mining on the site which activity exposed the botanical garden to environmental waste and degradation which still continues at an alarming rate.

68. The Petitioner contends that the acts by the Respondent in the circumstances were unlawful, unjust and in contravention of the petitioner's, constitutional rights. The Petitioner argues that the Respondent contravened Articles **40, 42, and 47** of the Constitution and should be so declared.

69. Although the Petitioner swore an affidavit in support of his Petition vouching for the allegation he made concerning the activities of the Respondent, I note that he has not annexed any report from an independent and impartial party, or an environmental-impact assessment report capable of guiding this court in making an informed determination on his contentions. Indeed he has painted the Respondent's activities as having exposed the botanical garden to environmental waste and degradation, however, the only evidence led in support of the allegation are the photographs of the alleged site which in my humble view is not sufficient to hold the allegation brought forward by the Petitioner.

70. Article 40 of the Constitution, protects a registered owner of property from being arbitrarily deprived of his land. In the present case, it is not in dispute that the petitioner herein was issued with a temporary letter of allotment. That upon having received the said temporal letter of allotment, to use the suit land for a period of time as was specified in the same, the same was to be confirmed by a further allotment by the Commissioner of Lands upon acceptance of the offer. The subsequent allotment has never been effected to date. There was no lease of title.

71. A letter of allotment is not proof of title as it is only a step in the process of allocation of land. This is the position enunciated by the Court of Appeal in the case of **Wreck Motors Enterprises –vs- The Commissioner of Lands and 3 Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)**, where the Court of Appeal stated as follows:

'Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.' (Emphasis added)

72. Similarly, in **Joseph Arap Ng'ok –vs- Justice Moijo Ole Keiwua NAI Civil Application No. 60 of 1997**, the Court of Appeal observed as follows:

'It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.'

73. In the present case, the Respondent alluded to the fact that the petitioner was only allowed to use the suit land for a period of time as was specified in the temporal letter of allotment dated 29th September 2009. That after the temporal allotment letter was issued to the Petitioner, the area claimed to be occupied by the botanical garden was over 5 acres with two traditional huts and napier grass planted by the Petitioner for his own use in breach of the purpose for which the land was temporary allocated to him. Further, no formal letter of acceptance was written by the Petitioner as was required under part iv of the said letter which stipulated as;

‘That the allottee upon acceptance of the offer shall undertake to pay the following.....’

74. The Respondent contended that the temporary letter of allotment neither indicated the size nor the particular location of the parcel of land allocated in the expansive hilly and rocky areas within Ol’kalou Town which in the ordinary circumstance would have been so indicated had the process been fully complied with.

75. That since the temporary allotment letter did not give any proprietary interest in land since the Petitioner has no title to the suit property, there is therefore no legal interest capable of protection under the law, and he cannot allege violation of his rights under Article 40 of the Constitution of Kenya 2010 against the Respondent.

76. Fundamental rights and freedoms are specifically set out in Chapter Four of the Constitution which rights and freedoms are individually identifiable and defined from article 26 to 51 of the Constitution.

77. It follows therefore, that a breach of any of the rights and freedoms must be specifically pleaded, particulars thereof set out and facts in respect thereof indicated in the Affidavit of a Petitioner.

78. In the decided cases of **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** and **Stephen Njuguna & others –vs- Hon. Lewis Nguyai & Others, H.C Petition No. 118 of 2011 (UR)** where it was held that:

*“The jurisdiction of the court under Article 22 and 23 of the Constitution is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. Each right under the Constitution is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him. The principle has been established in a long line of cases dating from **Anarita K. Njeru v Republic [1979] eKLR**. I also agree with the Respondent that the petitioner’s complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the petition is lacking in merit.”*

79. The wordings of Trevelyan J and Hancox J (as he then was) were clear, in the case of **Anarita Karimi Njeru** (supra), where they stated as follows:

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed”.

80. The petitioners’ claim is grounded on a letter of allocation of the suit properties. This letters does 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.

81. In order to consider whether the right to protection of property guaranteed under Article 40 is threatened, violated or infringed, I think it is necessary to set out the provisions as follows:-

40.(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 conversation 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 or 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.

82. Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the petitioner has been denied the right, either individually or in association with others to acquire or own property of any description in Kenya. In the petitioner's case, he was given an opportunity to own land when he was issued with a temporary letter of allocation but the same was not confirmed because he failed to comply with the terms thereof.

83. Article 40(2) limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The Petitioner did not complain of any such breach.

84. Article 40(3) and (4) deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application Article 40(3) or entitle him to compensation.

85. The petitioner has not made out any case that their property is being acquired in the manner contemplated by Article 40 of the Constitution to trigger application of Article 40(3) and (4). There has been no breach of Article 40, of the Constitution. Further, the Petitioner does not have any legal or proprietary interest in the suit properties capable of protection or enforcement under the provisions of **Article 40**. It is in this respect that the petitioner's claim must fail.

86. I however find that even though the Petitioner is not the registered owner of the property, he appears to have certain interests in the properties that he claims, the extent or validity of which would need determination in an appropriate forum. Consequently, in my view, the suit property cannot be taken away from him without, at the very least, affording him an opportunity to be heard in accordance with the rules of natural justice now enshrined in Article 47 of the Constitution. To that extent therefore, the Respondent is in violation of the rights of the Petitioner.

87. Section 27 of the Civil Procedure Act provides that ordinarily, costs are awarded at the discretion of the court. It provides as follows:-

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

88. Ordinarily, costs normally follow the cause or event. Costs are usually awarded to the successful litigant but as provided in Section 27(i) above, it is awarded at the discretion of the court.

89. In conclusion therefore I find as follows;

i. The Petitioner, not being the registered owner of the property that he claims but reliant on letter of temporary allotment, cannot maintain a claim for violation of the right to property under Article 40 of the Constitution against the Respondent.

ii. The said Petitioner is however entitled to fair administrative action guaranteed under Article 47 of the constitution before any adverse action is taken against him with regard to the property on account of which he holds the temporary letters of allotment.

iii. Each party shall bear its own costs.

Dated and delivered at Nyahururu this 23rd day of October 2018.

M.C. OUNDO

