



Mulama & 3 others v National Land Commission & 2 others; County Government of Kakamega (Interested Party) (Environment & Land Petition 5 of 2021) [2022] KEELC 13794 (KLR) (25 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION 5 OF 2021
DO OHUNGO, J
OCTOBER 25, 2022**

BETWEEN

**BONFACE LUKULU MULAMA 1ST PETITIONER
LAWRENCE MULAMA ITOLONDO 2ND PETITIONER
DESTERIUS SHITSAMA MULAMA 3RD PETITIONER
VALENTINE LING'ONDO MULAMA 4TH PETITIONER**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
DISTRICT LAND REGISTRAR KAKAMEGA 3RD RESPONDENT**

AND

COUNTY GOVERNMENT OF KAKAMEGA INTERESTED PARTY

JUDGMENT

1. By petition dated July 2, 2021, the petitioners averred that the first petitioner was lawfully allocated plot number Isukha/Lubao/425 (the suit property) jointly with one Mathias Masengo by the then County Council of Kakamega on September 23, 1994 and that they immediately took possession. That sometime in May 1999, the first petitioner and Mathias Masengo subdivided the suit property into seven parcels known as Isukha/Lubao/2093, 2094, 2095, 2096, 2097, 2098 and 2099 and transferred them to the petitioners and other parties.
2. The petitioners further averred that sometime in 1998, some persons claiming to be members of the community living around the suit property filed Kakamega HCC No 49 of 1998 against the first



petitioner, Mathias Masengo and Kakamega County Council and that the suit was dismissed on May 9, 2005. That the suit sought inter alia, a declaration that the suit property was held in trust by the Kakamega County Council and that its sale to third parties as absolute proprietors was null and void. The petitioners further averred that upon inquiry, they were shocked to learn that the first respondent through its then chairperson had made determinations for review of grants and disposition of public land appearing from pages 1 to 77 of the Kenya Gazette Notice No 6862 of 2017 and was adding an addendum to it contained in Gazette Notice Number 11043 dated November 10, 2017, at page 5819. That entry number 4 of the said addendum referred to the suit property and the interested parties under the entry were indicated as Masinde Muller University of Science and Technology, Bonface Lukulu, and Mathias Masengo. That in the addendum, the National Land Commission made a determination directing the Chief Land Registrar to revoke the title of Bonface Lukulu and Mathias Masengo and to reinstate the land to Masinde Muller University of Science and Technology, an entity not known in law and whose claim to the property has never been identified or known.

3. The petitioners further averred that the determination by the commission was done without the involvement of the petitioners who were directly affected as the titles they held were subdivisions of the suit property. That neither were the original registered proprietors of the suit property involved before the first respondent made its determination. The petitioners averred that their rights under Articles 40 (3) and 47 (1) of the Constitution were violated. They therefore prayed for the following orders:
 - a. A declaration that Title Number LR No Isukha/Lubao/425 was procedurally issued to the 1st Petitioner with Mathias Masengo therein having followed the required procedure.
 - b. A declaration that the failure by the 1st Respondent to hear the Petitioners before making a determination to revoke title Number LR No Isukha/Lubao/425 and the subsequent subdivisions being Isukha/Lubao/2093, 2094, 2095, 2096, 2097, 2098 and 2099 was in total breach of article 47(1) of the Constitution.
 - c. A declaration that the revocation of LR No Isukha/Lubao/425 and the subsequent subdivisions being Isukha/Lubao/2093, 2094, 2095, 2096, 2097, 2098 and 2099 by the respondents was procedurally unfair and as such in breach of Article 40 (3) of the Constitution.
 - d. A declaration that the determination by the 1st Respondent revoking the title LR No Isukha/Lubao/425 in the name of Bonface Lukulu and Mathias Masengo and reinstating the land to Masinde Muller University of Science and Technology an unknown entity in law and whose interest in the land cannot be ascertained was irregular and illegal.
 - e. A declaration that the letters addressed to the Petitioners by the 3rd Respondent dated December 15, 2020 purporting to cancel their respective titles via Gazette Notice No 11044 of November 10, 2017 and the 2nd Respondent's letter Ref No KKA/A/11/VOL.XVIX/57 dated 2nd November were irregularly issued and as such are illegal.
 - f. An order of judicial review in the nature of Certiorari moving into this court and quashing the decision of the 1st Respondent contained in Item Number 4 of the Addendum to Gazette Notice Number 11043 revoking title Number LR No Isukha/Lubao/425.
 - g. An order for Judicial Review in the nature of Certiorari moving into this court and quashing the decision of the 2nd respondent contained in its letter Ref No KKA/A/11/VOL XVIX/57 dated November 2, 2020 revoking the Petitioners titles.



- h. An Order of Judicial Review in the Nature of Certiorari moving into this court and quashing the decision by the 3rd Respondent contained in its letters dated December 15, 2020 cancelling the Petitioners titles.
 - i. An order reinstating Title Numbers Isukha/Lubao/2093, Isukha/Lubao/2094, Isukha/Lubao/2095, Isukha/Lubao/2096, Isukha/Lubao/2097, Isukha/Lubao/2098 and Isukha/Lubao/2099.
 - j. An order declaring the 1st Petitioner the rightful owner of LR No Isukha/Lubao/2098 and Isukha/Lubao/2099.
 - k. An order declaring the 2nd Petitioner the rightful owner of LR No Isukha/Lubao/2096.
 - l. And order declaring the 3rd Petitioner the rightful owner of LR No Isukha/Lubao/2097.
 - m. An order declaring the 4th Petitioner the rightful owner of LR No Isukha/Lubao/2093.
 - n. An order lifting the restriction placed on titles Number LR No Isukha/Lubao/2093, Isukha/Lubao/2094, Isukha/Lubao/2095, Isukha/Lubao/2096, Isukha/Lubao/2097, Isukha/Lubao/2098 and Isukha/Lubao/2099 by the Chief Land Registrar on 1/3/2018.
 - o. Costs of this Petition.
 - p. Any other order that this court deems fit.
4. The petition is supported by an affidavit sworn by the first petitioner who deposed that he was lawfully allocated the suit property jointly with Mathias Masengo by the then County Council of Kakamega on September 23, 1994 and that they immediately took possession. That the allocation was pursuant to minute No 40/94 of the Works Town Planning and Markets Committee of the then Kakamega County Council and that the said minutes confirming the allocation were communicated to the Commissioner of Lands through the Permanent Secretary in the then Ministry of Local Government via letter dated September 27, 1994 requesting the Commissioner of Lands to transfer the land to the first petitioner and Mathias Masengo. That the petitioners followed the due process of application for transfer confirmed by the council minute No 38/94 of the same committee of November 28, 1994 and that the application to the Land Control Board was approved on July 25, 1997. That thereafter, a transfer of land form was executed by the council in favour of the applicants after payment of requisite fees and a title deed was registered in the names of the applicants on October 6, 1995.
 5. The first petitioner further deposed that sometime in May 1999, as joint owners of the suit property with Mathias Masengo they lawfully subdivided the suit property in to 7 portions being Isukha/Lubao/2093 to 2099 and transferred them variously to third parties and the petitioners. That the said titles were unlawfully cancelled and or revoked as narrated in the portion of this judgment where the petition is summarised.
 6. In response to the petition, Brian Ikol, the Deputy Director Legal Affairs and Enforcement of the respondent and the secretary of the Review of Grants and Disposition of Public Land Committee filed a replying affidavit on behalf of the first respondent wherein he deposed that on March 24, 2016, the then County Land Management Board received a request for allocation of land from the founders and stake holders' association of WECO and Masinde Muliro University of parcel number Isukha/Lubao/425 located in Kakamega and the request prompted the County Land Management Board (CLMB) to seek the intervention of the County Government. That also cited were concerns of grabbing of this particular parcel and that the county planner responded by objecting to the allocation stating that the land belonged to the county government and wanted the same to be investigated by the



- first respondent. That upon receipt of the complaint, the commission conducted its own preliminary investigation to ascertain the veracity of the claims before invoking its jurisdiction and the defunct County Land Management Board invited parties to a hearing scheduled on May 5, 2016. That upon presentation of their positions and those of CLMB, CLMB analysed the documents presented and made the findings that the suit property measuring 7 hectares was owned by Kakamega County Council, that the land was reserved for use as Lubao grazing field, that the board was not shown an advertisement preceding the allocation by any of the applicants, that there was no change of user from grazing land to brick making use as required by law and that the board was not shown any authority to change the land from leasehold to freehold.
7. Brian Ikol further deposed that following the investigation, it was established that the said parcel was illegally allocated to Bonface Lukulu and Lawrence Mulama and further to the finding, a resolution was made further to a report dated May 26, 2016 which was served upon each party. That on receipt of the report the first respondent proceeded to review the matter and subsequently issued gazette notice No 6862 of 2017 directing the chief land registrar to revoke the title of the first and second petitioners to reinstate Masinde Muliro University of Science and Technology because the land was reserved for the university but was illegally allocated to the first and second petitioners.
 8. In further response to the petition, Fanuel Angaya Wemali filed a replying affidavit on behalf of the interested party. He deposed that the suit property was first registered in the name of the defunct Kakamega County Council and was reserved for use as Lubao Grazing Field. That with the onset devolution, the suit property was inherited by the interested party and that between the years 1995 and 1999, several entries were made in the register which were ultimately cancelled on May 11, 2021 and the suit property reverted to the first entry. He deposed further that the purported allocation of the suit property to Mathias Masengo and subsequent entries to the register were unlawful, illegal, unprocedural and legally untenable which led to the entries being cancelled and the land reverting back to the first entry being the Kakamega County Council and that the petitioners have not demonstrated that they legally acquired proprietary rights over the suit property. That the suit property has never been converted from public land to private land.
 9. The petition was canvassed through written submissions. The petitioners argued that the process of cancellation of their titles was not procedurally fair or reasonable as required under Article 47 (1) of the *Constitution* since they were never given an opportunity to be heard or to participate in the proceedings before the respondent prior to the determination to revoke their titles. Further arguing that the respondents were the duty bearers to the petitioners' rights to fair administrative action, the petitioners relied on Article 47 of the *Constitution* and on the case of *Munawar Shuttle v County Government of Kilifi & 2 others [2018] eKLR*. The petitioners further submitted that the legality of their title has never been successfully challenged and that the act of the respondents was aimed at grabbing the petitioners' title in favour of an unknown institution. They therefore urged the court to allow their petition.
 10. The interested party filed its submission on May 5, 2022 and argued that the suit property is government land set aside for public utility since it is lawfully held by and registered in the name of Kakamega County Council and held in trust for the residents of Kakamega County pursuant to provisions of Article 62 (2) of the *Constitution*. That the suit property was first registered in the name of Kakamega County Council on July 6, 1974 and that it was expressly reserved for use as Lubao Grazing Field. That the suit property was public land reserved for public utilities by the time it was purportedly transferred to the first petitioner and Mathias Masengo, and that as such, it was unavailable for allocation for private purposes. That any purported transfer was null and void ab initio. In that



- regard, the interested party relied on the case of [*Kenya Anti-Corruption Commission v Lima Limited & 2 others \[2019\] eKLR*](#) and [*Norbix Kenya Limited v Attorney General \[2014\] eKLR*](#).
11. The interested party further submitted that the suit property was not lawfully transferred to the petitioners since the procedures laid down in the Government Lands Act (repealed) were not followed in its alienation simply because the suit property was unavailable in the first place for disposal. In that regard, reliance was placed on the case of [*Ali Mohamed Dagane \(Granted Power of Attorney by Abdullabi Mubumed Dagane, suing on behalf of the estate of Mohamed Haji Dagane\) v Hakar Absbir & 3 others \[2021\] eKLR*](#).
 12. Regarding the question of whether the petitioners' rights under the [*Constitution*](#) were violated, the interested party submitted that pursuant to Article 47 of the [*Constitution*](#), the petitioners were afforded a fair chance to be heard before the entries on the register of the suit property were struck off and reverted to the first entry and that the petitioners themselves produced in their own bundle of documents an investigation hearing report dated May 26, 2016 by the County Land Management Board which report clearly states that the second petitioner was present for himself on behalf of all the respondents in the said proceedings. In conclusion, the interested party submitted that the petition has fallen short of the threshold of a constitutional petition and that the prayers sought by the petitioners are not available to them. Accordingly, the interested party urged that the petition be dismissed with costs.
 13. I have considered the petition, the affidavits, and the submissions filed by the parties. The issues that arise for determination are whether the petition has met the threshold of a constitutional petition and whether the reliefs sought should issue.
 14. The question of whether the petition has met the threshold of a constitutional petition is essentially one of jurisdiction. A lot of ink has been spent by the courts to underscore the centrality of the issue of jurisdiction. Jurisdiction, as has been stated many times, is everything. Without it, the proceedings come to an end and the court cannot make any further step. See [*Owners of the Motor Vessel 'Lillian S' v Caltex Oil \(Kenya\) Ltd \[1989\] eKLR*](#).
 15. The Supreme Court weighed in on the issue in [*Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others \[2012\] eKLR*](#) where it stated as follows:

A Court's jurisdiction flows from either the [*Constitution*](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the [*Constitution*](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
 16. The Court of Appeal underscored the conclusive nature of jurisdiction in [*Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service \[2019\] eKLR*](#) where it stated:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.
 17. Pursuant to Article 162(2) (b) of the [*Constitution*](#) of Kenya and Section 13 of the [*Environment and Land Court Act*](#), 2011 this court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the [*Constitution*](#). The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights



related to environment and land. See [*Daniel N Mugendi v Kenyatta University & 3 others \[2013\] eKLR*](#).

18. The law, as laid down in the principle of constitutional avoidance, is that allegations which can be claimed and proven away from the constitutional court ought not to be brought to the constitutional court. In [*Sumayya Athmani Hassan v Paul Masinde Simidi & another \[2019\] eKLR*](#), the Court of Appeal held that a petition filed in violation of the principle of constitutional avoidance is incompetent and that the trial court acted in excess of jurisdiction in determining it.
19. In [*Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another \[2016\] eKLR*](#), the court stated:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

In a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights.

However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.

20. The petitioners' case is that the first petitioner and Mathias Masengo validly owned Isukha/Lubao/425 and the resultant subdivisions and that the cancellation of their titles was a violation of their rights under Articles 40 and 47 of the [*Constitution*](#). There is no dispute that Isukha/Lubao/425 was public land initially. The petitioners contend that it was validly converted to private land. The respondents and the interested party do not agree. They maintain that the suit property remains government land set aside for public utility. Among the reliefs that the petitioners seek are declarations that they are the rightful or valid owners of the resultant subdivisions of the suit property. Besides the arguments about processes, the real dispute is about validity of the first petitioner's and Mathias Masengo's title to Isukha/Lubao/425 and the resultant subdivisions.
21. Pursuant to Article 40 (6) of the [*Constitution*](#), the protection of the right to property afforded by Article 40 (1) does not extend to any property that has been found to have been unlawfully acquired. It would be virtually impossible to determine the petitioners' claim without ascertaining the validity of their titles. There are ample statutory avenues for ascertaining the validity of titles to land. No valid reason has been given as to why the petitioners did not file an ordinary suit seeking the declarations that they are the rightful or valid owners of Isukha/Lubao/425 and/or the resultant subdivisions.
22. The petitioners also claim that they were not accorded an opportunity to be heard, contrary to Article 47 of the [*Constitution*](#). As I see it, the petitioners' claims in that regard are inextricably intertwined with the question of validity of the titles. Even if I were to be wrong on that account, there are statutory avenues for addressing alleged breach of the right to fair administrative action. In particular, Section 7 of the [*Fair Administrative Action Act*](#) provides that a person who is aggrieved by an administrative



action or decision may apply for review of the administrative action or decision. One doesn't need to file a constitutional petition to obtain redress for alleged breach of the right to fair administrative action.

23. In view of the foregoing discourse, I am persuaded, and I so hold, that this petition offends the principle of constitutional avoidance, thereby depriving this court, sitting as a constitutional court, of jurisdiction to hear and determine it. In the result, I strike out the petition. Considering the nature of the dispute, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Getanda for the petitioners

No appearance for the respondents

Mr Wabuko holding brief for Ms Mmbaka for the interested party

Court Assistant: E. Juma

