



**Kotiemo v County Government of Kisumu & another (Constitutional Petition 24 of 2021) [2023] KEELC 16302 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16302 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**CONSTITUTIONAL PETITION 24 OF 2021**

**E ASATI, J**

**MARCH 16, 2023**

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS AND CONSTITUTIONAL VALUES AND PRINCIPLES.**

**AND**

**IN THE MATTER OF: ARTICLES 1, 2, 10, 21, 22, 27, 40 (3) AND (4), 47(1), AND 259 OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF: SECTION 13(2), (3) & (7) OF THE ENVIRONMENT AND LAND COURT ACT, 2011.**

**AND**

**IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015.**

**AND**

**IN THE MATTER OF: THE BILL OF RIGHTS.**

**AND**

**IN THE MATTER OF: THE FUNDAMENTAL RIGHTS TO PROPERTY.**

**BETWEEN**

**JEFFREY JAMES KOTIEMO ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER- LANDS, HOUSING, PHYSICAL PLANNING AND URBAN DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. Vide the Petition dated 8<sup>th</sup> November 2021, Jeffrey James Kotieno, the petitioner herein, sought for orders that: -
  - a. A declaration be issued that the refusal and or unreasonable delay to compensate the Petitioner for the portion of land parcel registration No. KISUMU/KONYA/1358 on which Ong'adi dispensary is built is unconstitutional for violation of the Petitioner's rights to ownership of property as protected under article 40 (1), (3) & (4) of *the Constitution* of Kenya.
  - b. An order of mandamus be issued compelling the Respondents to immediately pay the Petitioner a total sum of Kshs 4,500,000 (Kenya shillings four million, five hundred thousand) being compensation for the portion of land registration No. KISUMU/KONYA/1358 on which Ong 'adi dispensary is built.
  - c. Interest on the sum in (b) above from the year 2008 until payment in full.
  - d. Costs of this petition be borne by the Respondents jointly and severally.
  - e. Such other orders as this court shall deem just to grant.
2. The Respondents who are the County Government of Kisumu and the Chief Officer Lands, Housing Physical Planning and Urban Development Kisumu County did not oppose the Petition. The record shows that upon service with the Petition, the Respondents entered appearance vide a Memorandum of Appearance dated 24<sup>th</sup> January 2022 filed in court on 27<sup>th</sup> January 2022 by the County Attorney, County Government of Kisumu. Thereafter no further pleadings or documents were filed by or on behalf of the Respondents.
3. When the matter came up for directions on the 7<sup>th</sup> July 2022 there was no attendance by the Respondents. An Affidavit of Service sworn by James Otieno Okudo on 6<sup>th</sup> July 2022 indicated that the Respondents had been served with Mention Notice. A copy of the said Mention Notice inviting the Respondents to attend court for directions on 7<sup>th</sup> July 2022 was attached to the Affidavit of Service. The same was duly received by the Respondents on 19<sup>th</sup> April 2022. On 31<sup>st</sup> October 2022 when the matter came up for hearing of the petition, the Respondents did not attend court as well. An Affidavit of service sworn by James Otieno Okudo on 12<sup>th</sup> July 2022 shows that the Respondents were served with a hearing Notice on 12<sup>th</sup> July 2022. A copy of the hearing notice annexed to the Affidavit of service was duly received and stamped with the stamp of the county Government of Kisumu on 12/7/2022. So the Petition proceeded ex parte and the Petitioner elected to urge the same by way of written submissions. An Affidavit of Service sworn by James Otieno Okudo on 2<sup>nd</sup> November 2022 shows that the Respondents were again served with a letter dated 2<sup>nd</sup> November 2022 from the Petitioner's Advocates informing the Respondents of the directions issued on 31<sup>st</sup> October 2022 that the petition be canvassed by way of written submissions.



## The Petitioner's case

4. The Petitioner's case against the Respondents is that he is the current registered proprietor of the parcel of land known as KISUMU/KONYA/1358 on which Ong'adi dispensary is built by the Respondents. That part of the land was offered by the family of one Gilbert Siru Omondi now deceased, to the Municipal Council of Kisumu in the year 2008 for the construction of a public health centre on the understanding that the Municipal Council of Kisumu would compensate the said family for the land. That the compensation has not been done and yet construction of the dispensary on the suit land is complete. That the Respondents have not given the Petitioner the reasons for the refusal and/or unnecessary delay in making the compensation and that this is contrary to the provisions of articles 40 and 47 (1) of *the Constitution* and section 4 of the Fair Administrative Actions Act No. 4 of 2015. That the refusal and unreasonable delay exudes malice and is aimed at unlawfully disenfranchising the Petitioner of his property.
5. The Petitioner further contended that the Respondents allocated Kshs 4,500,000/= in their Approved Budget Estimates for the year 2021/2022 for the said compensation but are yet to pay the said monies to the Petitioner and his family. That the manner in which the compensation has been withheld and/or refused is tainted with unreasonableness and procedural impropriety and against the national values under article 10 of *the Constitution*.
6. That under article 2, *the Constitution* is the supreme law of the Republic of Kenya and binds all persons and all state organs at both levels of government. That under article 10, all state organs, state officers and all public officers are bound by the national values particularly the value of the rule of law. That all the violations stated in the Petition are a direct affront and violation of his rights to ownership of property as protected under article 40 of *the Constitution* of Kenya.
7. The Petition was supported by the averments in the Supporting Affidavit sworn by the Petitioner on 8<sup>th</sup> November 2021, the Supplementary affidavit sworn by the petitioner on 6<sup>th</sup> July 2022 and the annexures thereto. The annexures are a copy of title deed marked JJK-1, copies of Grant of Letters of Administration and certificate of confirmation of grant marked JJK-2(a) and 2 (b) respectively and letters dated 21/2/2020 and 11/06/2020 marked JJK-4 (a) and 4(b) respectively all annexed to the Supporting Affidavit and a Surveyor's report dated 4<sup>th</sup> November 2021 and marked JJK-1 attached to the Supplementary Affidavit.

## Submissions

8. Written submissions dated 16<sup>th</sup> January 2023 were filed on behalf of the Petitioner by the firm of M/S O. J. Okoth & Company advocates acting for him. Counsel framed 2 issues for determination in the Petition namely;
  - a. whether or not the Respondents acquired and took possession and use of the suit parcel and
  - b. whether or not the petitioner is entitled to compensation and the prayers sought.
9. On the first issue of whether or not the Respondents acquired and took possession and use of the suit parcel, Counsel submitted that the Respondents acquired and took possession of a portion of the suit land sometime in the year 2008 from the then registered owner Mr Gilbert Siru Omondi deceased and have built Ong'adi dispensary, a public dispensary. Counsel submitted that this is an issue of fact which is confirmed by the petitioner's annexures JJK-4(a) and 4(b) in the petitioner's Supporting Affidavit



which counsel submitted are letter dated 21/02/2020 from the area Member of County Assembly and 11/6/202 from the area Chief. Counsel submitted further that the Respondents have since built a dispensary which is known as Ongádi dispensary. Counsel further referred the court to annexure JJK-1 in the Supplementary Affidavit a ground survey report which, counsel submitted, discloses that there is a dispensary built on the parcel with an acreage measuring 0.08 ha with a compound well fenced with barbed wire.

10. On whether the Petitioner is entitled to the compensation and the prayers sought, Counsel submitted that the Respondents acquired a portion of the suit land from the family of Mr. Gilbert Siru Omondi deceased, for public use. That the family was to be compensated for the acquisition. That the Petitioner as the administrator of the estate of Gilbert Siru Omondi pursuant to the Letters of Administration exhibited as JJK-2(a) and 2(b) transmitted the land to his name as the son of the deceased. That the Petitioner as the current registered owner of the suit land now seeks compensation on behalf of his family and the estate of the deceased. Relying on articles 40 of *the Constitution* counsel submitted that *the Constitution* dictates that where the state acquires land for public use then the owner thereof should be reasonably and justly compensated for such acquisition. Counsel referred the court to page 238 of annexure JJK- 5 to the Supporting Affidavit stated to be the approved budget estimates for the fiscal year 2021/2022 to show that the Respondents made budgetary allocation for the compensation but failed to pay. That under Article 40(3)(b) and (i) of *the Constitution*, the compensation should be prompt, just and in full hence the delay in payment is unconstitutional as it violates the Petitioner's right to ownership of property. That the Petitioner is entitled to the compensation and an order of mandamus to compel the Respondents to release the compensation amount of Kshs. 4,500,000/= to the Petitioner.

### **Analysis and determination**

11. I have read and considered the Petition, Supporting Affidavits and annexures thereto and submissions made. This being a constitutional petition, this court has a preliminary obligation to determine whether the petition passes the test of a constitutional petition as set out in the case of Anarita Karimi Njeru Vs. Republic (1979) eKLR where the court observed that if a person is seeking redress from the high Court on a matter which involves reference to *the constitution* it is important that the person should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed. Discussing this test in *Trusted Society of Human Rights alliance vs Attorney General & 2 others (Petition 229 of 2012); [2012] eKLR* the court held that

“the test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so they can adequately prepare their case.”

12. In the present petition, the provisions of *the Constitution* alleged to be infringed have been cited and the manner of breach and or violation is stated to be refusal and or unreasonable delay to pay compensation for compulsory acquisition of land contrary to *the constitution*. The petition in my view satisfies the test in Anarita Karimi case. The petitioner however has the burden to prove the alleged breach or violations.
13. The first issue presented by the petitioner for this court's determination is whether or not the Respondents acquired and took possession and use of the suit land. The Petitioner pleaded that the family of Gilbert Siru Omondi offered part of the suit land to the Municipal Council of Kisumu to construct a public health facility and that the Municipal Council of Kisumu did take up the land and constructed a dispensary (Ong'adi dispensary) which is now complete. In annexure 4(a) which



is indicated to be a letter dated 21/2/2020 from the MCA Kajulu Ward to the Director, Department of Lands, Housing, Physical Planning & Urban Development of the 1<sup>st</sup> Respondent and in annexure 4(b) a letter dated 11<sup>th</sup> June 2020 from the chief, it is indicated that the construction of the dispensary was complete.

14. The law that gives the state eminent power to compulsorily acquire privately owned land for public use under the doctrine of eminent domain also creates a right for the land owner to be compensated. In Kenya under the former constitutional regime this was provided for and regulated by the Constitution and the Land Acquisition Act cap 295 Laws of Kenya (now repealed). In the present constitutional dispensation, the legal framework for compulsory acquisition of land is found primarily in the Constitution of Kenya 2010 and particularly article 40 thereof and the Land Act. In this petitioner, the compulsory acquisition is said to have taken place in the year 2008 which means that the same ought to have been done pursuant to the provisions of the former constitution and the Land Acquisition Act. The law provided elaborate steps to be taken by both the land owner and the government in the process of compulsory acquisition. None of those steps have been alluded to in this case. There is no evidence as to what exactly happened. The Petitioner simply stated in paragraph 5 of the Petition that sometime in 2008 the family of Gilbert Siru Omondi offered part of the land to the then Municipal Council of Kisumu for the construction of a health centre. The particular member(s) of the family of the deceased who offered the land is not disclosed. The letters from the area leaders (the Hon MCA and area Chief) and the surveyor's report go to demonstrate that there is a dispensary built on the land. There is no evidence to demonstrate that state needed the land or approached the family of the deceased for or commenced the process of compulsory acquisition thereof. The evidence of the Petitioner discloses a voluntary donation of land as opposed to compulsory acquisition. There are no correspondences at all between the owners of the suit land and either the Municipal Council of Kisumu or the County Government of Kisumu concerning the suit land or at all. There is no evidence as to why no steps were taken since 2008 till the year 2021 when the petition was filed. My finding is that the evidence on record is not sufficient to prove compulsory acquisition.
15. The second issue presented by the Petitioner for determination is whether or not the Petitioner is entitled to compensation and the other prayers. The Petitioner pleaded that at the time when the family of Gilbert Siru Omondi gave part of the suit land to the Municipal Council of Kisumu for construction of a public health facility, there was an understanding between the parties that the Municipal Council of Kisumu was to compensate the said family. The Hon. MCA in his letter stated that some agreement was entered into that included compensation by the year 2009. There is no evidence whether the understanding or agreement was in writing or not. The agreement was not exhibited. There is no evidence that the family of the deceased or the Petitioner ever claimed. for the compensation. The amount of compensation demanded in the petition is Kshs.4, 500, 000. There is no evidence as to how this amount was arrived at. No valuation report, no agreement between the parties on the amount of compensation due. The Land Acquisition Act which was applicable in 2008 and the Land Act and other laws applicable now provide the formula and what to consider in computing the amount of the compensation. There was no evidence that this was done.
16. It was also part of the Petitioner's case that the Respondent made a budgetary allocation for the said compensation and to demonstrate this, annexed to the Petition a document described as Approved Budget Estimates for fiscal year 2021/2022. I have keenly read the document and noticed firstly, that the document is not signed, not dated or authenticated in any way. Secondly, the relevant entry that the court was referred to on page 238 simply reads "Purchase of land for Ong'adi". There is no evidence to show that this is one and the same thing as compensation for land compulsorily acquired for the construction of Ong'adi dispensary. There is no evidence as to the source of the document. Under the evidence Act, the Petitioner bears the burden of proof.



17. In Maina & 4 others vs Director of Public prosecutions & 4 others ( Constitutional Petition E 106 & 160 of 2021 (consolidated) [2022] KEHC 15 (KLR) Constitutional & Human rights) ( 27 January 2022) Judgement, the court held that: -

“ the petitioners were required to show the rights alleged to be infringed as well as the basis of each of their grievances. The *evidence Act*, cap 80, Laws of Kenya applied to matters generally relating to evidence. Section 2 thereof provided that the *Evidence Act* applied to all judicial proceedings in or before any court other than a Kadhi’s court but not proceedings before an arbitrator. Section 107 (1), (2) and 109 of the *Evidence Act* were on the burden of proof. The provisions required whoever desired any court to give judgement as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed.

When a person was bound to prove the existence of any fact the burden of proof lay on that person. The burden of proof as to any particular fact laid on the person who alleged and wanted the court to believe in its existence unless it was provided by any law that the proof of that fact should lie on any particular person.”

I find that the Petitioner has not discharged this burden

18. Under article 40 of *the constitution*, an owner of private property compulsorily acquired by the state for public use, has a right to be compensated and that the constitutional principle on compensation is that such compensation be prompt, just and full. In Patrick Musimba vs National Land Commission & 4 others [2016]- eKLR it was observed that “there exists, no doubt, an overarching right to compensation under article 40(3) of *the constitution* where a person deprived of his property for a public purpose or in public interest.” However, a basis has to be laid for this in the form of cogent evidence of the compulsory acquisition and computation of the amount of compensation due. My assessment of the evidence placed before the court herein is that it is not clear whether the petitioner or the family of the deceased were compulsorily deprived of the property by the state or they offered the land.

In Kanini Farm Ltd vs Commissioner of Lands [1986] KLR 310 it the was held that compensation does not mean any speculative value of the land but an equivalent value which could be the contract value or market value.

19. Having found that the evidence placed before court does not: -
- a. prove compulsory acquisition of the deceased’s land by the Respondents,
  - b. prove that there was an agreement or understanding or in the circumstances of the case, an obligation on the part of the Respondents to compensate,
  - c. show how the amount of Kshs.4,500,000/= claimed was arrived at,

I hold that the Petition has not been proved. I disallow the Petition. No order as to costs.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI**

**JUDGE**

