



Shiramba & 27 others v County Government of Uasin Gishu & 3 others (Environment & Land Petition 14 of 2018) [2023] KEELC 16890 (KLR) (19 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16890 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 14 OF 2018
EO OBAGA, J
APRIL 19, 2023
IN THE MATTER OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
10,20, 22, 27, 40, 46, 59, 67 AND 70 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE LANDS ACT, 2012
AND
IN THE MATTER OF UNLAWFUL ACQUISITION OF PRIVATE
LAND AT KAPSOYA ESTATE-ELDORET

BETWEEN

FLORENCE CHIMOLI SHIRAMBA 1ST PETITIONER
JACKSON KIPRUTO NGETICH 2ND PETITIONER
ROBERT W. OMBAYO 3RD PETITIONER
RAHMA CHEPKORIR 4TH PETITIONER
JOSEPH NDUNGU KANYOKO 5TH PETITIONER
KIPROTICH AMDANY 6TH PETITIONER
BEATRICE M. GACHUBE 7TH PETITIONER
JULIUS K. KOLIL 8TH PETITIONER



BENSON MILIMU	9 TH PETITIONER
CHARLES KIBUTHU	10 TH PETITIONER
ESTHER MWIHAKI MWANGI	11 TH PETITIONER
BEATRICE J. SAWE	12 TH PETITIONER
MUSA KIPCHUMBA KIYAI	13 TH PETITIONER
EUNICE CHEPKORIR LESAN	14 TH PETITIONER
JOSEPH TALLAM	15 TH PETITIONER
LUKAS K. CHEPTOO	16 TH PETITIONER
BONIFACE K. NDUNGU	17 TH PETITIONER
MARY NJERI	18 TH PETITIONER
DAVID KANYERIA	19 TH PETITIONER
PETERSON MWANGI	20 TH PETITIONER
ESTHER MWANGI	21 ST PETITIONER
BARNABAS K. KIBOS	22 ND PETITIONER
PAUL NJOROGE	23 RD PETITIONER
GRACE WANJIRU	24 TH PETITIONER
WAMBUGU IRUMBI	25 TH PETITIONER
WASHINGTON M. KARIUKI	26 TH PETITIONER
FRANCIS TARAR	27 TH PETITIONER
PAUL KOECH KIPSUM	28 TH PETITIONER

AND

THE COUNTY GOVERNMENT OF UASIN GISHU	1 ST RESPONDENT
THE NATIONAL LAND COMMISSION	2 ND RESPONDENT
THE CHIEF LAND REGISTRAR, UASIN GISHU COUNTY .	3 RD RESPONDENT
THE HON. ATTORNEY GENERAL	4 TH RESPONDENT

JUDGMENT

Introduction;

1. The Petitioners filed a Constitutional Petition on 4/10/2018 against the Respondents in which they sought the following reliefs: -
 1. A declaration that the Petitioners constitutional right to property and/or interest in or over the properties within Kapsoya Estate in Uasin Gishu County deserves the protection by the



honourable court and that the protection do issue accordingly and consequently conservatory and or/protection orders are made over the said suit properties.

2. A declaration that the petitioners' rights and fundamental freedom and in particular the protection of right to property and/or interest in or right over the property has been violated and/or infringed and their property within Kapsoya Uasin Gishu County is in real danger of being arbitrarily acquired by the Respondent and their beneficiaries to the detriment of the petitioners and that cannot be countenanced in law and in the circumstances the court frowns upon the said act or acts.
 3. A declaration to issue that the acts of the 1st and 2nd Respondents of unlawful attempting and/or of unlawful deprivation of the petitioners of their allotted parcels of land in the light of the above was without any legal basis, was an act of illegality and unconstitutional and are liable to the petitioners in compensation and/or damage for losses, of use and for breach of their constitutional rights on such compensation as shall be assessed by the court.
 4. Damages and/or compensation as against the 1st and 2nd Respondents for breach and/or violation of the petitioner's constitutional right to properties and protection of the same in such sum as shall be assessed by the honourable court.
 5. Costs of this petition.
 6. Any other or further order that the Honourable court deems it fit and necessary to grant.
2. The 3rd and 4th Respondents filed an answer to the Petition and raised a cross petition in which they sought the following reliefs:-
- i. A declaration that the certificate of leases and letters of allotment allegedly issued to the Petitioners under paragraph 6 of petition were unlawfully and illegally acquired and are null and void ab initio.
 - ii. An order cancelling the certificate of lease and letters of allotments described at paragraph 6 of the petition.
 - iii. An order declaring that land parcel referred as Eldoret Municipality Plot No. PDP 17/96/80 zone B and plot No. 2 in Kapsoya is public land and can only be used for public purpose or to promote public interest.
 - iv. An order of permanent injunction restraining the petitioners, their servants, agents and or any other person acting under them from ever laying claim to, interfering with or in any manner dealing with land parcel referred as Eldoret Municipality Plot No. PDP 17/96/80 zone B and Plot No. 2 in Kapsoya.

Background;

3. Between 1997 and 1998, the Municipal Council of Eldoret which is the predecessor of the 1st Respondent allotted plots to the Petitioners within Kapsoya Estate which is within Eldoret Municipality. Some petitioners were given allotment letters on 16/2/1997 and some were given their allotment letters on 6/9/1998.
4. In the year 2000 and specifically on 31/10/2000, the Department of Physical planning planned the Kapsoya Estate which clearly designated public utility plots. The area where the Petitioners had been allotted was reserved for Kapsoya site and service scheme.



5. Some of the Petitioners who had taken possession put up houses where they resided. Some transferred their allotted portions to others with the express permission of the Eldoret Municipal council. The municipal council of Eldoret was collecting rates from the petitioners.
6. In or about the year 2016, the 1st Respondent which is the successor of the defunct municipal council of Eldoret moved to the area allotted to the Petitioners and put a fence round the Petitioners plots effectively locking them out from their properties. The 1st Respondent then started putting up public facilities such as the County Commissioners offices and other public facilities. It is this action by the 1st Respondent which prompted the Petitioners to file this petition.

Petitioners case ;

7. It is the Petitioners case that they applied for allocation of plots to the Municipal council of Eldoret. Their applications were approved and they were given allotment letters. They proceeded to make payment to the Municipal council of Eldoret and were issued receipts.
8. Some Petitioners like the 1st and 2nd Petitioners proceeded to process title documents. They were given certificate of leases. Some had already constructed houses where they were residing. Some transferred their plots to others with the express permissions of the Eldoret Municipal council.
9. In or about 2016, the 1st Respondent moved to the area and fenced the area allotted to the Petitioners arguing that the area had been reserved for public purposes. The 1st Respondent then proceeded to build public facilities on the plots which had not been built up.
10. The Petitioners contend that the unilateral taking over of their plots by the 1st Respondent amounted to compulsory acquisition without compensation. They therefore contend that the actions of the Respondents violated their constitutional rights as enshrined in Article 40(3) of the Constitution of Kenya.
11. The Petitioners contend that as a consequence of the Respondents actions, the Respondents are in violation of Articles 10, 19, 20, 21, 23, 27, 40, 47, 48 and 50 of the Constitution of Kenya.

The 1st Respondent's case;

12. The 1st Respondent generally denied the petitioners contention that they are the lawful proprietors of parcel No. Eldoret Municipality Plot number PDP 17/96/80 zone B and plot No. 2 Kapsoya. The 1st Respondent contends that the allotment procedures were not followed in that no council meeting was held to approve any applications or allotments which had been made by the Petitioners.
13. The 1st Respondent further contends that the suit properties were and are still public land which is held by it. The 1st Respondent states that it could not compulsorily acquire what was already public land that could not be subjected to compulsory acquisition.
14. In the alternative and without prejudice to the averment that the properties held by the petitioners were public land, the 1st Respondent contends that the petitioners did not meet the conditions set out in the allotment letters in that they did not accept the offer in writing within 90 days; did not make payment within the stipulated timelines; they failed to develop their properties within 2 years from the date of acceptance of the allocation; they did not stick to the development plans and specifications and that they attempted to part with possession of the suit properties in contravention of the terms and conditions in the offer letters.



15. The 1st Respondent further contends that the actions complained of were carried by the municipal council of Eldoret and not itself and that therefore it was wrongfully joined in this case and further that it never violated the constitutional rights of the Petitioners as alleged by the Petitioners.

The 3rd and 4th Respondents case;

16. The 3rd and 4th Respondents generally denied the Petitioners contention in particular that they legally and procedurally applied for and were allocated plots from the municipal council of Eldoret; that they complied with the requirements for the allocation of plots; that they paid for the plots and that they have been paying rates and land rent as alleged.
17. In the alternative, the 3rd and 4th Respondents contend that the Petitioners petition does not raise any constitutional issues worth of litigation as a constitutional petition. The 3rd and 4th Respondents contend that from available records, the area referred to as plot No. PDP 17/96/80 zone B and plot No. 2 Kapsoya was in the 1980's reserved for Kapsoya site and service scheme and was therefore a public utility only reserved to be used for public interest and was not available for allocation to private individuals.
18. The 3rd and 4th Respondent further contend that any certificate of leases which were issued may have been issued by mistake and are therefore null and void.

Analysis and determination ;

19. The parties were directed to file written submissions in respect of the petition and cross petition. The petitioners filed their submissions on 5/10/2022. The 1st Respondent filed submissions on 9/11/2022. The 3rd and 4th Respondents filed their submissions on 14/11/2022. The 2nd Respondent neither entered appearance nor filed a replying affidavit to the petition and therefore did not file any submissions.
20. I have carefully considered the petition by the petitioners and the opposition to the same by the 1st, 3rd and 4th Respondents. I have also considered the submissions by the 1st, 3rd and 4th Respondents. The issues which emerge for determination are firstly, whether the plots which were allocated to the petitioners were hived off land reserved for public purposes. Secondly, whether the allocation of the plots to the petitioners was lawful or not. Thirdly, whether the petitioners paid for their plots. Fourthly, whether the Petitioners are entitled to the reliefs claimed in the petition and cross petition.

Whether the plots which were allocated to the Petitioners were hived off land reserved for public purposes;

21. There is no contention that the plots which were allocated to the Petitioners were from land set aside for Kapsoya site and services scheme. A look at the area map from the Physical Planning department shows that land was set aside for public utilities such as schools, health centres, Police post and other public amenities. Besides the setting aside of these utility plots, the municipal council set aside land for Kapsoya site and service scheme.
22. A site and service scheme is an area set aside for purposes of sale or lease to low income earners. The concerned municipalities put up basic infrastructure facilities like sewerage systems, roads and lighting. The plots in the scheme are then sold or leased to low income earners to put up houses for their occupation. The concept of site and service schemes came up because of the need to avoid slums coming up. It is a concept which is encouraged by the World Bank and UN HABITAT.



23. The Petitioners who have been able to provide documents have shown that they were allocated their plots by the defunct Municipal Council of Eldoret. Out of 28 petitioners, it is only 15 petitioners who were able to provide documents showing that they had allotment letters and that they paid the Kshs 40,000/= which was required to be paid. The 15 petitioners who were able to demonstrate allocation and payment are the 1st, 2nd, 3rd, 4th, 5th, 7th, 10th, 13th, 14th, 16th, 17th, 18th, 19th, 21st and 22nd petitioners.
24. The 2nd, 3rd, 5th and 10th Petitioners were not the original allottees. Their plots were transferred to them from the original allottees with the written permission of Municipal council of Eldoret. The 2nd Petitioner got his plot from Kimonda Limited, the 3rd Petitioner got his land from Christopher Kipketer, the 5th Petitioner got his from Washington M. Kariuki who was his son and the 10th Petitioner got his from Paul Thuo. The 6th Petitioner inherited her plot from her late husband Philip Mburu Gachube.
25. The 1st and 2nd Petitioners went ahead to process title documents. They obtained certificate of leases which were issued by the 3rd Respondent on 19th September, 2012 and 1st January, 2011 respectively.
26. The 6th, 7th, 9th, 11th, 12th, 15th, 20th, 23rd, 24th, 25th, 27th and 28th Petitioners were indicated in paragraph 6 of the Petition as having been allocated land but there was no single document which was filed to show that they were allocated the plots shown against their names in paragraph 6 of the Petition. The 26th Petitioner is the one who transferred his land to his father who is the 5th Petitioner. He should not have been named as a Petitioner having transferred his plot to his father.
27. The name of Paul Koech Kipsang appearing in number 5 is a repeat of the one appearing in number 32 in paragraph 6 of the Petition. This is because the Plot number is the same. The name appearing in number 27 in paragraph 6 of the Petition does not appear at the heading of the Petition. There was no amendment to the Petition. It is therefore clear that Joseph Ndungu though appearing as having been allocated a Plot is not a Petitioner in this Petition.
28. The place where the 15 Petitioners were allocated having been set aside for Kapsoya site and service scheme, the same was available for allocation to the Petitioners for the purpose for which it was reserved. The Respondents cannot therefore argue that it was public land meant for any other purpose other than for allocation to low income earners to put up residential houses and commercial enterprises.

Whether the allocation of the plots to the Petitioners was lawful or not and whether the Petitioners paid for their plots.

29. While dealing with issue number one hereinabove, I have demonstrated the purpose of a site and service scheme. The 15 Petitioners have demonstrated that they had allotment letters for which they paid and took possession. They have been paying land rent and rates. The counsel for the 1st Respondent argued that the receipts which were issued to the Petitioners were suspect in that they were all written by the same hand despite the fact that they were issued within a span of years. The counsel for 1st Respondent is not a hand writing expert and in any case, it is not common to have one person working as a cashier or accountant in one office for more than a decade.
30. There was an argument in the submissions by the 1st Respondent that the Petitioners did not pay for their Plots within 90 days as required in the allotment letters. This may be so but as long as the monies were received, this did not invalidate the allocations. Subsequent to receipt of the monies from the Petitioners albeit late, the Municipal Council of Eldoret continued to receive land rent and rates from the Petitioners. Some Petitioners even obtained titles which were issued by the 3rd Respondent.



31. The authorities which the 3rd and 4th Respondents have relied on are not applicable in this Petition. This is because the Kapsoya site and service scheme was meant to be given out to low income earners either on lease basis or sale. In the case of *Kenya Anti-Corruption Commission v Lima Ltd & 2 Others* (2019)eKLR, the land in issue was already alienated land which had facilities like the High Court, Fire Station and Administration Police camp. Unlike in the Lima Limited case (Supra), the Kapsoya site and service scheme was allocated to deserving persons for the intended purpose.
32. This is the same case with *Chemey Investment Ltd v Attorney General & 2 Others* (2018) eKLR where land reserved for Uasin Gishu District Hospital was allocated. The case of *Kipsirgon Investments Limited v Kenya Anti-Corruption Commission* also dealt with a case where the company had been allocated land which was meant to be an open space.

Whether the Petitioners are entitled to the reliefs claimed and whether the 3rd and 4th Respondents are entitled to the reliefs in the cross Petition.

33. The crux of the Petition is that the Constitutional rights of the Petitioners under Article 40 of the *Constitution* were violated. Article 40 of the *Constitution* stipulates 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. (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.
34. The 1st Respondent in its submissions has conceded that the Petitioners were evicted from their properties and that Public facilities like the County Commissioner's offices have been set up there including other public facilities. I have demonstrated hereinabove that the allocation to the 15 Petitioners who have provided documents was lawful. The Kapsoya site and service scheme was meant to be leased out or sold to low income earners. This was duly done when the Municipal Council of Eldoret sold Plots to the Petitioners upon issuing them with letters of allotment.
35. The Petitioners were removed from their properties which were converted to Public use. The Petitioners were not compensated for the loss of their properties. This is contrary to Article 40 of the Constitution which states that where a property of an individual is required for public purpose, then the acquisition must be in accordance with the Constitution and any Act of Parliament applicable in this case the Land Act of 2012 and the Land Acquisition Act.
36. The 1st Respondent moved into the Petitioners properties and chased them away claiming that they were on Public Land which was not the case. What the 1st Respondent ought to have done was to acquire the Petitioners' properties in accordance with the Constitution and the Land Act of 2012 as well as the Land Acquisition Act. As this was not done, I find that the Petitioners' Constitutional rights under Article 40(3) of the Constitution were violated. The Petitioners have already been chased away from their properties and public properties put in place. The appropriate remedy to the 15 Petitioners is compensation for loss of those Properties which were taken away unprocedurally.
37. The reliefs in the cross Petition were based on the assumption that Kapsoya site and service scheme was reserved for Public purposes and that the land was public land. This assumption was made because of ignorance about how site and service schemes operate. As it is now clear that the Petitioners were lawfully given allotment letters for which they paid for, none of the reliefs in the cross Petition can be granted.
38. There were some photographs of houses which were annexed to the 1st and 2nd Petitioners witness statements. There was no mention on whether the houses belonged to the 1st and 2nd Petitioners. In the absence of any mention on the status of the houses, I take it that the 1st and 2nd Petitioners had not constructed any houses from where they were evicted. The Petitioners counsel never submitted on the amount of compensation to each of the Petitioners.
39. However, from a look at the acreage as shown in the titles and letters of allotment, I notice that the Plots were small. The Plots are about 2 to 3 Kilometres from the town Center in Kapsoya Estate which is well served with tarmacked roads and has other facilities. The task of assessing the amount of compensation was left to the court. Taking all these factors into account and considering the amount the Plots were purchased for and taking into account the increase in value of the Plots in the area, I find that an award of Kshs. 2,000,000 (two million) for each of the 15 Petitioners will be adequate compensation.
40. The 2nd Respondent was not to blame as it was not asked to undertake compulsory acquisition of the petitioners' plots on behalf of any entity.

Disposition

41. From the above analysis, I make the following final orders;



- a. A declaration that the Constitutional rights of the 1st, 2nd, 3rd, 4th, 5th, 7th, 10th, 13th, 14th, 16th, 17th, 18th, 19th, 21st, and 22nd Petitioners under Article 40 of the *Constitution* were violated by the 1st Respondent.
- b. Each of the 15 Petitioners mentioned in (a) above is awarded Kshs. 2,000,000/= (two million) for violation of their right to property which is protected under Article 40 of the *Constitution*
- c. The Petition by the 6th, 8th, 9th, 11th, 12th, 15th, 20th, 23rd, 24th, 25th, 26th, 27th and 28th Petitioners as well as the cross Petition by the 3rd and 4th Respondents are dismissed
- d. The Petitioner's Petition against the 2nd Respondent is dismissed
- e. Each party shall bear their own costs.

42 It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF APRIL, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Omboto for Petitioners

Ms. Obino for Ms. Akello for 2nd Respondent

Mr. Odongo for 3rd and 4th Respondents

Ms. Kirimi for 1st Respondent.

Court Assistant –Laban

