



Kilesi & 2 others (Suing on their own behalf and on behalf of 795 members of the Kandutura Community) v National Land Commission & 2 others (Environment & Land Petition 1 of 2022) [2023] KEELC 17882 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND PETITION 1 OF 2022**

AK BOR, J

MAY 24, 2023

BETWEEN

SIMON KILESI 1ST PETITIONER

PATRICK ECHWA 2ND PETITIONER

FRANCIS KARIUKI 3RD PETITIONER

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF 795 MEMBERS OF
THE KANDUTURA COMMUNITY**

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE COUNTY GOVERNMENT OF LAIKIPIA 2ND RESPONDENT

THE COUNTY ASSEMBLY OF LAIKIPIA 3RD RESPONDENT

JUDGMENT

1. The Petitioners filed this petition on 6/2/2020 on behalf of 795 members of the Kandutura Community who reside in Kandutura area within Rumuruti Sub County of Laikipia County against the 1st Respondent established under Article 67 of *the Constitution* and operationalised by the *National Land Commission Act*, and the 2nd Respondent, which is a devolved government established by Article 176 of *the Constitution* and the *County Governments Act*. They asserted that the land in Rumuruti area in Kandutura Phase I and II was trust land belonging to the communities' resident there who have a right to possession, enjoyment, use, occupation, control and or inheritance of that land.
2. They averred that within 2019, the allocation of plots in Kandutura Phase 1 project was concluded resulting in the beneficiaries being given letters of allotment. They claimed that the area Member of County Assembly (MCA), the Honourable Jacob Edong Ekoil representing Sosian Ward, spearheaded



- and oversaw the allocation of plots in Phase 1 which benefited him, his allies and other outsiders but not members of the Kandutura community. They claimed that allocation of plots in Kandutura Phase II was underway and being apprehensive that they may not be allocated plots as it happened in Phase I, they convened a meeting and elected an all-inclusive committee to oversee the Kandutura Phase II project.
3. They claimed that the area MCA refused to cooperate with the leaders elected by the members in overseeing the allocation of plots in Phase II. In a bid to remedy the shortfalls that occurred in the allocation of plots in Phase I, the Petitioners drafted a petition for the County Assembly of Laikipia to seeking to have the allocation of plots in Kandutura Phase II spearheaded by the committee members elected by the community. Their petition which included a request for consideration of the list of 795 beneficiaries developed by the community was not considered and the allocation of plots in Phase II continued.
 4. They argued that the Respondents' act of allocating plots in Kandutura to strangers who were neither members of the Kandutura community nor residents of the area was biased, unfair, illegal, prejudicial and failed to involve members of the community who should rank first among beneficiaries of plots within the area. They added that the Respondents' acts were in breach of their rights to own property. They claimed that they faced eminent eviction because the people allocated plots had started fencing them and issuing oral notices for eviction.
 5. They urged that the Respondent's conduct amounted to discrimination, isolation and unfair administrative action which would prejudice them. Further, that the Respondent's conduct violated Article 10 of *the Constitution* on the values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized and cited Articles 27, 40, 47, 60, 63 and 159 of *the Constitution*.
 6. They sought various reliefs including a conservatory order to restrain the Respondent's from developing, allocating, distributing, and issuing allotment letters to persons who are not members of the Kandutura Community; and a declaration that the Respondents should consider their interest in the process of allocating plots in Kandutura. They also sought a declaration that the allocation of plots to persons who were not members of Kandutura community by the Respondents contravened their rights to fair administrative action.
 7. They also sought a declaration that any action by the Respondents in allocating plots to persons who were not members of Kandutura community would contravene the Petitioners' right and would contravene the Respondents' duty of enforcing equality and protection of the Petitioner's freedom from discrimination. They sought an order of certiorari to quash the Respondent's decision to allocate plots to people who were not members or residents of Kandutura Community in Phase I and II. They also sought to have the Respondents compelled to repeat the allocation of plots to members of Kandutura Community and people residing within the area only. They also sought the costs of the petitions.
 8. The petition was supported by the affidavit of Patrick Echwa Eregae who deponed that he was competent to swear the affidavit. He exhibited a list of the members of Kandutura Community who he deponed had lived in Rumuruti and more so Kandutura from the colonial era. He averred that the Petitioners had suffered discrimination from the Respondents during the process of distribution and allocation of land in Kandutura area, Rumuruti Sub County in Phase I and expressed concern that that trend was likely to recur in Phase II. He averred that the Respondents distributed and allocated land within Kandutura without considering the genuine residents of Kandutura and alluded to the process of allocation of plots being spearhead by the area MCA representing Sosian Ward.



9. He deponed at paragraph 10 that they got a hint that the process of allocation under Phase II was underway and in a bid to ensure that the Petitioners were considered for allocation of land in Phase II, they convened a meeting and elected a committee to oversee the Kandutura Phase II project. He produced a copy of the minutes of the meeting held on 13/10/2018. He also produced a copy of the petition which they drafted for the County Assembly of Laikipia to consider the matter, which did not elicit any response. He argued that the allocation of plots was proceeding in Phase II under the leadership of the MCA leading to the allocation of the plots to strangers who were neither members of the community nor were they residents in the area. He added that they objected to the continued allocation of plots in Kandutura area because it was being done in a discriminatory, biased, unfair, illegal, prejudicial manner that failed to involve members of the community who should be the first ranking beneficiaries of the plots. He added that they faced the risk of being evicted from the place they considered home because the persons allocated plots in Kandutura area had begun fencing their portions and giving notices to residents to vacate the area. He produced photographs taken of the land and urged the court to allow the petition.
10. Despite being served with the court documents, the 1st and 3rd Respondents did not file any documents in response to the petition. The 2nd Defendant filed a replying affidavit sworn by Nathan Mbugua in which he deponed that he was the County Surveyor of Laikipia County and stated that the process of allocating public land was governed by Section 12(7) of the *Land Act* which provides that public land can only be allocated if it had been planned, surveyed and serviced and where guidelines have been prepared in line with Section 17 of the Act.
11. Mr. Mbugua confirmed that the planning and survey process in respect of the public land which is proposed for allocation in Kandutura area had not been completed and that the development guidelines had not been prepared. In view of the incomplete processes, it was his position that any allotment letters already issued should be cancelled to allow completion of the planning, survey and preparation of development guidelines in conformity with Section 12(7) of the *Land Act*. He averred that since the court was seized of the dispute over the allocation of public land in Kandutura, then it was in the best interest of the parties if the allocation process were done under the supervision of the court.
12. The petition was canvassed through written submissions. The Petitioners and the 2nd Respondent filed their submissions. The Petitioners submitted that the allocation of plots in Kandutura Phase I and the intended allocation of plots in Phase II was characterised by illegality, bias, prejudice and lack of public participation. They relied on the decision in *Kaps Parking Ltd v County Government of Nairobi (2012) eKLR* where the court gave the prerequisites for public participation, which include the public being accorded reasonable access to the information they are called upon to give views on; sensitisation of people on what they are called to give views on; according the public reasonable time to interrogate the information and come up with views; and lastly, a defined manner through which the public or stakeholders may render their response on the matter.
13. They urged that the Respondents failed to fulfil those four basic requirements. Further, that being ordinarily residents on the suit land, they were constitutionally entitled to have a say in the allocation of the plots and that it was unconstitutional for the area MCA to unilaterally decide who would benefit from the allocation of plots.
14. They submitted that public participation was not conducted in the allocation of plots in Kandutura Phase I and added that the intended allocation of plots in Kandutura Phase II was irregular and unlawful. They argued that Article 62 (4) of *the Constitution* provided that public land should not be disposed of except in terms of an Act of parliament specifying the nature and terms of that disposal.



15. The Petitioners relied on Section 12 of the *Land Act* governing the allocation of public land while pointing out that Section 12(7) stipulates that public land should not be allocated unless it had been planned, surveyed, serviced and guidelines for its development prepared.
16. They pointed out that the 2nd Defendant confirmed in its replying affidavit that planning and survey of the disputed land had not been completed. They urged that the purported allocation of plots in the absence of planning, survey and development of guidelines was illegal and that any allotment already undertaken should be nullified.
17. The Petitioners relied on Article 47 (2) of *the Constitution* and Section 4 of the Fair Administrative Actions Act in support of the argument that allocation of plots to persons who were not residents of Kandutura infringed upon their right to fair administrative action because they were not given an opportunity to participate in the allocation of the plots in Kandutura and were not given reasons for being left out of the list of beneficiaries. They argued that the allocation of plots failed to give proper consideration to their interest. Further, they urged that they were never empowered to participate in the process hence that process was unreasonable and ought to be quashed.
18. The Petitioners contended that they had a legitimate expectation that their interests would rank in priority or that they would be included in the list of beneficiaries if the land was to be allocated. Further, that they had a procedural legitimate expectation that the Respondents would follow the law while allocating the plots but the procedure was not followed occasioning them unfairness.
19. They adverted to Article 40 of *the Constitution* on the protection afforded to every person of the right to acquire property. They cited *Sirikwa Squatters Group v Commissioner of Lands & 9 Others* [2017] eKLR and *Mitu-Bell Welfare Society v Africa (Amicus Curiae)* [2021] eKLR in support of the argument that legitimate expectation was an overriding interest and that where the landless occupied public land and established homes on it, they had a protectable right to housing and over the land. That having lived on the land all their lives, they had an interest in the land which was eligible for protection under Article 40 of *the Constitution*. Further, that to evict them from the land was a threat and violation of their right to own property and a disregard of their dignity as human beings. They invited the court to declare that their rights to acquire and own property had been infringed.
20. The Petitioners contended that their right to equality before the law and freedom from discrimination under Article 27 was breached when they were omitted from the list of beneficiaries in Kandutura Phase I and Phase II without being given legitimate reasons for exclusion from the list and when strangers benefitted from allocation of plots in Kandutura Phase I merely because they were allied to the area MCA in total disregard of the lowly Petitioners who did not have connections to the Respondents and who were therefore not considered for allocation of plots. They added that some allies of the area MCA benefitted multiple times from the allocation while the Petitioners were left landless.
21. They relied on *Charles Opondo Ochieng & 2 others (All suing on their own behalf and on behalf of Jacom Pepela & 112 others) v Kabarak Farm Ltd & 19 Others and County Government of Trans Nzoia & 7 others (Interested Parties)* [2021] eKLR in which the court questioned why the suit land was taken away from persons who were in occupation and given to others who were not in occupation, and the criteria applied to prefer outsiders over the persons who had been in occupation of the land for decades. The court found that the Petitioners' rights under Article 27 of *the Constitution* not to be discriminated against had been violated. The Petitioners urged that the preference of strangers over the occupants of Kandutura area in the allocation of plots was highly discriminatory and unfair.
22. The Petitioners concluded that public land should not be used by a public officer or state organ to advance personal interests. They urged that it was infelicitous and imprudent that land intended to



- settle the landless was being allocated to benefit those in power and reward allies of the elite in society to the detriment of the appropriate beneficiaries. They emphasised that allocation of land should be done in accordance with *the Constitution* and other relevant laws. They added that the injustice occasioned to them could not be adequately remedied by an award of damages and urged the court to grant the orders sought in the petition.
23. The 2nd Respondent relied on the replying affidavit Nathan Mbugu sworn on 24/5/2021. It submitted that the Petitioners had not satisfied the requirements for a petition and had failed to demonstrate violations of their constitutional rights. It urged that constitutional violations must be pleaded with a reasonable degree of precision as enunciated in *Anarita Karimi Njeru v Republic (1976 – 1980) KLR 1272* while adding that the Petitioners failed to state the provisions of *the Constitution* which they claim it violated or threatened to contravene. It added that it was not possible for it to respond substantively and adequately to the petition.
 24. The 2nd Respondent relied on Section 107 of the *Evidence Act* regarding the point that whoever desires a court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts, he must prove the existence of those facts by discharging the burden of proof which lay on him. It also relied on *Edward Akong'o Oyugi & 2 Others v Attorney General (2019) eKLR* where the Judge observed that court decisions are not based on unsupported hypothesis and that parties are required to present clear evidence in support of their cases.
 25. The 2nd Respondent submitted that the Petitioners failed to furnish material to demonstrate illegality or bias or the basis of the serious allegations it makes that the allocation process was characterised by illegality and bias. Further, that they had also failed to produce evidence of previous illegal allocation of public land. Further, that the Petitioners merely annexed a list of members of Katundura area and minutes of meetings purported to have taken place yet none of those documents support the Petitioners' case against the 2nd Respondent. The 2nd Respondent contended that the petition was founded on premature apprehension and was not justiciable for want of ripeness and that it should be dismissed.
 26. The 2nd Respondent submitted that pursuant to Article 67(2)(a) of *the Constitution* as read with Section 12 of the *Land Act*, the 1st Respondent bore the sole mandate to allocate public land in the manner prescribed in that section and that the prerequisites which the 1st Respondent ought to comply with while allocating public land were set out in Section 14.
 27. The 2nd Respondent was emphatic that he did not have any mandate in determining how the process was undertaken. It pointed out that by virtue of Article 62 (2) of *the Constitution*, public land merely vested and is held by County Governments in trust for the people even though administration vests in the 1st Respondent. It relied on *Cordison International (K) Limited v Chairman National Land Commission & 44 others (2019) eKLR* on the limited scope of the involvement of County Governments while upholding the role of the 1st Respondent in the allocation of public land.
 28. The 2nd Respondent submitted that it was evident that the Petitioners' apprehension which is pre-emptive, presumptuous and speculative should not be blamed on it because it had always advocated for a lawful process in allocating land within its territory and had not violated any mandate in the process of public land allocation. It concluded that the Petitioners failed to prove their case to the required threshold and urged the court to dismiss the petition to pave way for lawful public land allocation.
 29. The issue for determination is whether there was infringement of the Petitioners constitutional rights and whether they are entitled to the reliefs they sought in the petition.



30. The Petitioners case is that public land in Kandutura area of Rumuruti in Laikipia County which they claim to have occupied since the colonial era was allocated to other people and they were left out despite being the deserving beneficiaries. They are apprehensive that just as they missed out on the allocation of the land comprising Phase 1, they are likely to miss out on allocations in Phase II.
31. The only evidence which they placed before the court is the list of Petitioners, minutes dated 30/5/2019, demand letter dated 30/5/2019, the petition to the County Assembly of Laikipia and photographs. Despite making allegations against the area MCA, Jacob Ekoil, the Petitioners did not make him a party so that he could respond to those allegations.
32. The Petitioners did not place any evidence before the court to show that public land exists or existed in Kandutura, how it was allocated and who the beneficiaries of that allocation were. There is nothing placed before the court to support the Petitioners' claim that public land is being allocated in Phase II of Kandutura to their disadvantage and in breach of their rights. There is also no evidence of the strangers who the Petitioners claim were allocated the land in Kandutura area which should have been allocated to them.
33. Section 9 of the *Land Act* provides that public land may be converted to private land by allocation. The section mandates the 1st Respondent to make rules for the better carrying out of that section including regulating and controlling the conversion of land from one category to another and prescribing factors to be considered in determining land that is to be converted.
34. Section 12 of the Act deals with the allocation of public land and provides that whenever the National or County Government is satisfied that there is need to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the 1st Respondent by way of public auction, application confined to a targeted group of persons or groups to ameliorate their disadvantaged position or the other forms prescribed in subsection 1. The Petitioners could make a case to the 2nd Respondent under this legal provision for allocation of land to ameliorate their disadvantaged position.
35. Section 12 (7) of the *Land Act* prohibits allocation of land unless it has been planned, surveyed and serviced and guidelines for its developments prepared in accordance with Section 17 of the Act. Nothing was placed before this court to show that the land in question had been planned, surveyed or serviced.
36. The court agrees with the 2nd Respondent that it is the 1st Respondent and not the 2nd Respondent which is mandated by law to deal with allocation of public land in the manner prescribed by law. The Environment and Land Court does not play any role in the allocation of land and has no mandate to supervise the allocation of the public land in Kandutura as the 2nd Respondent invited it to do.
37. The court declines to grant the orders sought in the petition dated 6/2/2020. Each party will bear its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 24TH DAY OF MAY 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Wangechi Macharia for the Petitioners

Mr. K. Njiru holding brief for Mr. M. Gitonga for the 2nd Respondent



Stella Gakii- Court Assistant

No appearance for the 1st and 3rd Respondents

