



Sadera & 9 others v Narok County Government & 14 others; Hammerkop Migration Camp (Interested Party) (Environment and Land Constitutional Petition E007 of 2022) [2023] KEELC 17574 (KLR) (23 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17574 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E007 OF 2022

CG MBOGO, J

MAY 23, 2023

IN THE MATTER OF ARTICLES 1,2,3,10,19,20,21,22,23

(3),35,40,43,47 (1),50 73,75,165 (3) (B) AND 259 1(B) OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SUPREMACY IN THE CONSTITUTION

PURSUANT TO ARTICLE 2 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 20, 27,28,40,50

& 174 OF THE CONSTITUTION OF KENYA

AND IN THE MATTER OF ILLEGAL AND UNLAWFUL

DEPRIVATION OF PROPERTY RIGHTS BY THE

RESPONDENTS

AND IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

MATIKO OLE SADERA 1ST PETITIONER

DAVID NAURORI 2ND PETITIONER

PAUL KARBOLO 3RD PETITIONER



STEPHEN KAITET	4 TH PETITIONER
SANINGO ROBERT	5 TH PETITIONER
RIMOINE TOGOM	6 TH PETITIONER
KIPILA N	7 TH PETITIONER
JENNIFER S	8 TH PETITIONER
MEMUSI SENGENY	9 TH PETITIONER
JOEL LEMURT	10 TH PETITIONER

AND

NAROK COUNTY GOVERNMENT	1 ST RESPONDENT
SAMPAU TOMOI	2 ND RESPONDENT
TUBULA OLE LEMURT	3 RD RESPONDENT
JAMES PARMUAT OLOLKUMUM	4 TH RESPONDENT
SAITOTI OLE KETUYO	5 TH RESPONDENT
KOTOINE SADERA	6 TH RESPONDENT
LAMPESHUA SAKATA	7 TH RESPONDENT
SIRINTAI AMANI	8 TH RESPONDENT
FRED NTEKEREI	9 TH RESPONDENT
LEMEROK SENGENY	10 TH RESPONDENT
DOTI KETUYO	11 TH RESPONDENT
MOTORON TIRA	12 TH RESPONDENT
JOSHUA OLE SHANKIL	13 TH RESPONDENT
TINKOI TAKI	14 TH RESPONDENT
SOPHIA SENGENY	15 TH RESPONDENT

AND

HAMMERKOP MIGRATION CAMP	INTERESTED PARTY
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JUDGMENT

1. The petitioners herein filed a petition dated November 21, 2022 seeking for orders jointly and severally against the respondents and the interested party for:-
 - a. A declaration that by the 1st respondent purporting to re-allocate the suit premises to the 2nd -14th respondents without according the petitioners a hearing or an opportunity to be heard as provided under Article 50 of the *Constitution of Kenya* violated the aforesaid Article of the *Constitution* and the rules of natural justice.



- b. A declaration that by the 1st respondent allotting or allocating the petitioners (sic) the suit premises and allowing the petitioners to lease and or rent them out to the interested party and the interested party's predecessor, the petitioners had and or held and or formed legitimate expectation that they would be first in line to be considered should the 1st respondent choose to re-allocate and re-allot the suit premises to any persons/parties, the 2nd to 14th respondents herein included and hence any action to the contrary violated the petitioners legitimate expectation.
- c. A declaration that the actions of the 1st respondent to unilaterally and without any explanation to purport and re-allocate and or re-allot the suit premises to the 2nd to 14th petitioners (sic) cements the petitioners assertion that the 1st respondent is living in the time of pre-2010, Constitution or the 1st respondent believes that it is a dictatorial government which is a total violation of Article 4 (2) of the *Constitution of Kenya* which provides that the Republic of Kenya shall be a multi-party democratic state founded on the national values and principles of governance referred to in Article 10.
- d. A declaration that the purported re-allocation and or re-allotment of the suit premises was done in secrecy contrary to the principles of good governance of transparency, accountability and public participation as provided for under article 10 of the *Constitution of Kenya* since it was never advertised to the members of the public, the petitioners included that the suit premises were available for re-allocation and or re-allotment, for the petitioners to participate in applying and or bidding for the reallocation and or re-allotment of the suit premises to the 2nd to 14th respondents.
- e. A declaration that the 1st respondent's purported re-allocation and re-allotment of the suit premises was done without according the petitioners the right to a fair administrative action as provided for under Article 47 and 48 of the *Constitution of Kenya* as no reason be it oral or written has ever been communicated to the petitioners why the 1st respondent chose to re-allocate or re-allot the suit premises to the 2nd to 14th respondents herein and thus the entire events leading to thereto were not only unlawful, unreasonable but also procedurally unfair.
- f. A declaration that the 1st respondent's decision to re-allocate and re-allot the suit premises without prompt payment in full of just compensation to the petitioners while knowing that the same property had been allotted and allocated to the petitioners wherefrom they were earning rent in the sum of Kshs 50,000/- per month amounts to violating the petitioners' right to property and or interest in property, or right over property as guaranteed and protected under Article 40 of the Kenya Constitution.
- g. A declaration that the 1st respondent's purported decision to re-allocate and re-allot the suit premises from the petitioners to the 2nd to 14th respondents without any explanation amounts to discrimination as provided for under Article 27 of the *Constitution* and violation of the petitioners' right to dignity as provided by Article 28 of the *Constitution of Kenya*.
- h. A declaration that the petitioners are the legal and bonafide allottees of that property known as Olkutoto Loonchil Special Campsite situate at Maasai Mara Game Reserve together with all appurtenant interest belonging thereto.
- i. Judicial review order of certiorari bringing before this honourable court for purposes of it being quashed, the decision of the 1st respondent to arbitrarily deprive the petitioners interest in and over all that property known as Olkutoto Loonchil Special Campsite and rights over or interest



appurtenant thereto without following due process and without prompt, just and adequate compensation.

- j. Judicial review order of prohibition prohibiting the 1st respondent from unlawfully re-allocating and re-allotting the suit property or in any manner whatsoever interfering with the petitioners' property and/or interest in or over upon all that property known as Olkutoto Loonchil Special Campsite.
 - k. A permanent injunction restraining the respondents, the respondents spouses, servants, children, employees workers, assignees, lessees, tenants or any other person working under the respondents' instructions and or title from setting foot and or trespassing on the property known as Olkutoto Loonchil Special Campsite and an order directed at the Officer Commanding Narok Police Station to ensure compliance and implementation.
 - l. Compensation for the violation of the petitioners' rights enumerated above and for loss of income.
 - m. An order directing the interested party to pay the rent to the petitioners in this matter.
 - n. A declaration that the actions of the 5th, 9th, 11th, 13th and 15th respondents as pleaded and or particularized at paragraph 26 of the petition herein amounts to violation of article 73 and 75 of the Constitution of Kenya as they are consistent with the purpose and objects of the Constitution, do not demonstrate respect for the people, do not bring honour to the nation and dignity to their respective offices, and they do not promote public confidence in the integrity of the office and they are a clear indicator of the conflict between personal interests and public or official duties and thus demean the offices the aforesaid respondents holds with the consequence that the respondents are unfit to hold any public office.
 - o. That the costs of these proceedings be borne by the respondents herein jointly and severally.
 - p. That the honourable court be pleased to make any further order or grant any further relief it may deem fit and just to grant.
2. The gist of the petition is that in its meeting held on July 1, 2008, the Game and Veterinary Committee, approved and allocated/allotted the site at Olkutoto Loonjil near Musiara within the Maasai Mara Game Reserve to the petitioners and that from July 3, 2008, the petitioners have been the legitimate allottees of the suit property having been adopted and ratified by the 1st respondent's predecessor on July 4, 2008. Subsequently, the petitioners constructed a camp site and leased it to Africa Latitude Kenya Limited who have been in peaceful and quiet possession and who pay a monthly rent of Kshs 50,000/-.
 3. The petitioners further contended that vide a letter dated February 18, 2016, Africa Latitude Kenya Limited transferred its operations to the interested party who continued to pay a monthly rent of Kshs 50,000/-. Further, that from April 2016, the petitioners noted that the interested party was not paying rent as agreed which prompted them to visit the 1st respondent's office to ascertain the problem.
 4. The petitioners contended that in the month of September, 2022, they stumbled upon a letter dated April 22, 2016 written by the 1st respondent and allocating the suit property to the 2nd to 14th respondents which was illegal, irregular and without observing the rules of natural justice. Also, that the 2nd to 14th respondents are collecting rent instead of the petitioners who are the legitimate owners.
 5. The petitioners further contended that the 15th respondent used her office of Chief Officer-Tourism and Wildlife to allocate the suit property to her son who is the 6th respondent. That the 5th and 11th



respondents are the children of the MCA-Mara while the 2nd respondent was his chief campaigner and who by virtue of his office, influenced the said allocation to his children and his chief campaigner. Also, that the 13th respondent used his position as the in charge of trade to influence illegal allocation of the suit property.

6. The petitioners contended that the said actions are unconstitutional and violate the express provisions of Articles 2,4,10,27,28,40,47,48,50,73,75 and 232 of the Constitution. The petitioners contended that in re-allocating the suit property to the 2nd to 14th respondents, the petitioners were not afforded an opportunity to be heard as provided under Article 50 of the Constitution as they had legitimate expectation that they would be the first to be considered should the 1st respondent choose to re-allocate the suit property to anyone else.
7. The petitioners further contended that the said re-allocation was done in secrecy contrary to the principles of good governance provided under Article 10 and 4 (2) of the Constitution. Further, that they were not accorded the right to a fair administrative action as provided under Article 47 and 48 of the Constitution as no reason whether oral or written was communicated to them. In addition, their right to property guaranteed under Article 40 of the Constitution was violated as they were collecting rent in the sum of Kshs 50,000/- a month.
8. The petitioners contended that the decision to re-allocate the suit property without any explanation amounted to violation of the petitioners' right to dignity as provided by Article 28 of the Constitution.
9. In conclusion, it was the petitioners' averment that the actions of the 5th, 9th, 11th, 13th and 15th respondents do not demonstrate respect for the people, dignity to their respective offices, do not promote public confidence in the integrity of the office and is a clear indicator of the conflict between personal interests and official duties.
10. The petition was supported by the affidavit of the 1st petitioner sworn at Nakuru on even date.
11. The 2nd to 15th respondents and the interested party filed their joint reply to the petition dated December 15, 2022. The 2nd to 15th respondent and the interested party contended that they are not tenants of property known as Olkutoto Loonchil Special Campsite and they also disputed its existence. Further, they contended that they know nothing about the entity known as Africa Latitude Limited and have also not had a relationship with the said entity and neither have they ever paid rent of Kshs 50,000/- to the petitioners.
12. The 2nd to 15th respondents and the interested party contended that the site being operated was allocated to the 2nd to 14th respondents after meeting the necessary legal requirements which operations began from scratch as there was no structure. They further contended that the petitioners own a camp that is 3 kilometers from the 2nd to 14th respondents and the interested party operations and the issue of clarity as to the position of the campsite was determined in the year 2016 in a meeting with the County Secretary which the petitioners absconded despite being invited. Further, that the petitioners have no authority to influence or allocate any area within the Mara and the allegations are baseless.
13. They further contended that their allocation was not a re-allocation as the site was not occupied by anyone. Further, that the said allocation was done in compliance with the law and they have not violated anyone's right. Also, that the petitioners had not been allocated the site given and the issue of being consulted does not arise and as such, they cannot allege compensation over a property they do not own or have any right of ownership.



14. The 2nd to 15th respondents and the interested party contended that the prayers sought are ambiguous, unmerited and incapable of being granted as the instant matter before court is not a judicial review application. Also, that there is no privity of contract between the petitioners and the interested party.
15. The petitioners filed a further affidavit in response thereto sworn by the 1st petitioner on 15th May, 2023. The petitioners deposed that there have been previous engagements between the parties over the suit property now described by the respondents as the interested party and it is the same and which was procedurally, regularly and legally allotted to the petitioners. Also, that the interested party has had engagements with the petitioners and the spirited defence of undescribed premises is to mislead this court.
16. The petitioners maintained that they let the suit property to an entity known as Africa Latitude Limited and subsequently to the interested party for a sum of Kshs 50,000/-. As such, the response is an afterthought to mislead this court. Also, that one petitioner, Joel Lemurt, has disowned the petition as he is a beneficiary of the lease between the respondents and the interested party.
17. The petition was canvassed by way of written submissions. The petitioners filed written submissions dated May 16, 2023. The petitioners raised the following issues for determination as follows:-
 - i. Whether the petition herein meets the threshold of a constitutional petition.
 - ii. Whether the petitioners were lawfully allocated the suit premises Olkutoto Loonchil Special Campsite.
 - iii. Whether the 2nd to 15th respondents and the interested party are occupying the suit premises; or in the alternative which premises that are occupied.
 - iv. Whether there have been any dealings between the petitioners, the respondents, the interested party herein and an entity known as Africa Latitude Kenya.
 - v. If the answer to the issues i, ii, iii and iv above should the court proceed to grant the prayers sought in the petition in their entirety.
 - vi. Who should bear the costs of this petition.
18. On the first issue, the petitioners submitted that a perusal of the petition and the supporting affidavit leaves no doubt that the petition meets the threshold elaborated in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR.
19. On the rest of the issues, the petitioners submitted that as per the letter or agreement dated November 14, 2014, the interested party/Little Olkutoto Campsite entered into an agreement with Community Camps Limited which was trading as African Latitude Limited and this is a clear indication that there have been dealings between the petitioners and the interested party herein. They further submitted that it was agreed that community camps will be the sole user of Olkutoto Loonchil Campsite which is also known as HammerKop Migration during the year 2015 and the agreement was to run for 5 years from the year 2015 and which agreement indicated that it will be renewed automatically from the year 2020. These, the petitioners submitted, that it is indicated at pages 21, 23 and 24 of the petition and which shows that the interested party continues to be in the suit property.
20. The petitioners further submitted that by a letter dated April 22, 2016, the 1st respondent took away the suit property from the petitioners and gave it to the 2nd to 15th respondents without any recourse to law and the same violated Article 40 (3) of the *Constitution*. Further, that the respondents violated



the petitioners right to a fair administrative action, access to justice and the right to a fair hearing by purporting to re-allocate the suit property to the respondents without according them an opportunity to face the accusers which was in violation of Article 47, 48 and 50 of the *Constitution*. The petitioners relied on the case of *David Moranga Oyugi v County Government of Kisii & 4 others* [2022] eKLR.

21. With regard to compensation, the petitioners further submitted that the campsite could accommodate sixteen occupants per night and with the sum of 30 USD per non-resident, the sum generated per year for eight years that the interested party has neglected to remit is USD 1,382,400. Also, that the rent due for the eight years would be Kshs 1,257,947.60/.As such, the petitioners submitted that an award of Kshs 200,000,000/- and costs would be appropriate in this matter. The petitioners relied on the case of *Wilfred Gisebe Gisebe & 2 Others v County Government of Kisii & 2 others* [2017] eKLR.
22. The respondents and the interested party did not file written submissions. Be that as it may, I have carefully analysed and considered the pleadings, documents in support thereof and the written submissions filed by the petitioners and the issue for determination is whether the petitioners are entitled to the reliefs sought.
23. It was the petitioners' case that the interested party is a tenant of the suit property which was allocated or allotted to them by the 1st respondent. That their allocation came as a result of the Game and Veterinary Committee meeting held on July 1, 2008 which approved their application and they became legitimate owners on July 3, 2008. In addition, that on July 4, 2008, the then Narok County Council in its full council meeting adopted and ratified the resolution of the Game and Veterinary Committee. That upon approval, the petitioners constructed a camp site and rented the suit property to Africa Latitude Kenya Limited for a monthly rental income of Kshs 50,000/- and who subsequently transferred its operations to the interested party. The petitioners contended that from the month of April, 2016, the petitioners noted that the interested party was not remitting rent which led them to visit the office of the 1st respondent to see where the problem was.
24. The question then is what was the nature of the relationship between the petitioners and respondents as relates to the suit property that raises a constitutional question or issue that ought to be determined by this court?
25. The 2nd to 15th respondents and the interested party disputed the existence of the suit property and also Africa Latitude Limited. The respondents and the interested party also maintained that the property claimed by the petitioners is distinct than that which is operated by the interested party.

26. Article 23(1) of the *Constitution* states;-

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

27. From the foregoing Article, it is clear that the jurisdiction of this court has been confined to interpretation of any constitutional question as well as redress for violations of constitutional rights.
28. The petitioners in this case contended that their right to property under Article 40 of the *Constitution* as they received rental income from the suit property. Also, that they were not given an explanation as to why the 1st respondent allocated the suit property to the 2nd to 14th respondents which was in violation of Articles 47 and 48 of the *Constitution*. In addition, that the 5th, 9th, 11th, 13th and 15th respondents used their public offices to influence the said allocation. This then begs the question, were the petitioners' constitutional rights violated?



29. In the case of *CNM v WMG* [2018] eKLR, the court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

The court went on further to state;

“When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.[17] The issues raised here will only require the court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & others vs MEC for Education and Training, Eastern Cape & Others*[18] in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak*[19] notes that:-

“the *Constitution* provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: If regard is had to the provisions of ..., the *Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of the *Constitution* are also constitutional matters. So too,..., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the *Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[20]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

30. A closer look at the petition herein and examining the dispute herein keenly, it is my view that the nature of the dispute herein is more of a commercial dispute, rather, than a constitutional one. The dispute revolves around a contractual relationship displayed through a tenancy agreement willingly entered into by Community Camps Limited trading as African Latitude Limited and Camp Owners dated November 14, 2014 and which agreement spells out the terms and conditions of the operation of the campsite.



31. As I have understood the petitioners, it appears that the 1st respondent is responsible with interference of the contractual relationship between them and the interest party as they had legitimate expectation that should the 1st respondent choose to re-allocate the suit property, then they would be the first to be considered.
32. In my view, the instant petition is therefore not properly before this court.
33. The other issue is whether the petitioners' rights were violated. Article 40 of the Constitution provides that:

“ 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 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, 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 in good faith of land acquired under clause (3) who may not hold title to land.”

34. It was the petitioners' case that they are the rightful and legitimate owners of the suit property who ought to be collecting rent from the interested party and the actions of the 1st respondent to re-allocate the suit property to the 2nd to 14th respondents deprived them of this right.



35. Article 47 of the Constitution grants every person a right to fair administrative action. Subsections (1) and (2) thereof state 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.”
36. In addition, Article 50 guarantees every person a right to a fair hearing. Article 50 (1) provides that:-
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.”
37. From the documents relied upon by the petitioners, I do note that vide minutes of the Game and Veterinary Committee Meeting held on July 1, 2008, members resolved to approve the special camps of Olkutoto and Olkutoto Lonjil and form a subcommittee to visit the sites and establish the suitability of the area of operation. Also, I note that the petitioners application for the development of the campsite was approved vide letter dated July 3, 2008 but more importantly is the indication that the said approval did not grant the petitioner proprietary rights and which they were required to meet certain conditions as outlined in the letter before commencement of any development.
38. The petitioners besides approval were required to meet certain conditions before commencing any developments. The petitioners are mute on whether they fulfilled these conditions as set out in the letter dated July 3, 2008.
39. The attention of this court is drawn to the letter dated April 10, 2016 which formed part of the documents in the petitioners supporting affidavit. This letter was addressed to Africa Latitude Kenya Limited by the 1st respondent through the Chief Officer Tourism and Wildlife informing them of their knowledge that Africa Latitude Kenya Limited has been operating without legal documents and that one person has been benefiting at the expense of the others. The 1st respondent went ahead and informed the said Africa Latitude Kenya Limited of the true beneficiaries of the camp as approved by her office.
40. A careful reading of the agreement dated November 14, 2014, gives no indication that the petitioners were entitled to the 1st priority of re-allocation when the lease expired in the year 2020. Also, the letters dated April 10, 2016 leaves doubt as to whether the petitioners indeed met the conditions set out in the letter dated July 3, 2008 more so in the absence of documents to show compliance thereof.
41. My analysis and finding is that the petitioners’ rights were not violated by the respondents. Also, the petitioners did not raise a complaint which was not addressed so as to say that they were denied a hearing or even fair administrative action.
42. The upshot of the above is that the petition is dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 23RD DAY OF MAY, 2023.

HON. MBOGO C.G.

JUDGE

23/5/2023



In the presence of:-

CA: Chuma

