



Residents of Rangwa Hill Farm & 4 others v Kenya Forest Service & 3 others (Environment & Land Petition 13 of 2021) [2023] KEELC 19266 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19266 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT & LAND PETITION 13 OF 2021

GMA ONGONDO, J

JULY 24, 2023

IN THE MATTER OF THE PREAMBLE, ARTICLES 19,

25,26,27,28,33,34,35,36,37,40,41,42,43,47,50,53,54,55,56,57,60,61,62,63,64,65,66,67,68,69,70,73,74,75,79,80,159,175,176,180 OF THE CONSTITUTION.

AND

IN THE MATTER OF THE LAND ACT NO 6 OF 2012 IN THE MATTER OF THE COUNTY GOVERNMENT ACT OF 2012.

AND

IN THE MATTER OF THE UNITED NATIONS INTERNATIONAL COVENANT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS PREAMBLE, ARTICLE 6

AND

IN THE MATTER OF THE PREAMBLE, ARTICLE 7, 19, 20, 21, 26, 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

AND

IN THE MATTER OF ARTICLES 2,19,22,25,26, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF PREAMBLE, ARTILCES 2,4,10,11,13 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS.

BETWEEN

- RESIDENTS OF RANGWA HILL FARM 1ST PETITIONER**
- OLEKO GEORGE OKOTH 2ND PETITIONER**
- HASTINGS GEORGE OUMA 3RD PETITIONER**
- FRANCIS OLEKO 4TH PETITIONER**



SAMWEL OJWANDO MANGEE 5TH PETITIONER

AND

KENYA FOREST SERVICE 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

**CABINET SECRETARY ENVIRONMENT AND NATURAL
RESOURCES 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. By a petition dated 28th August 2020 and lodged in court on 1st September 2020, the five petitioners through Richard Kaba and Company Advocates, are seeking the following orders;
 - a. A permanent injunction restraining the Respondents by themselves, their Agents, servants or howsoever from implementing legal notice number 124 of 2017 without public participation, selling, sub-dividing, evicting, removing, destroying, demolishing, and/or doing anything prejudicial to all persons living, working and/or doing business at Rang’wa Hill Farm land (The suit parcel of land herein) situated approximately thirty-five kilometers South West of Homa Bay Town, Homa Bay County.
 - b. A declaration that the residents of Rang’wa Hill Farm right to equal treatment before the law under article 27 and Article 43 (1) (b) (c) (d), 40 & 47(1) (2) (3) of the Constitution has been denied, infringed, violated and/or threatened.
 - c. An order directing the 2nd Respondent to issue the Petitioners with title deeds of their plots in RANG’WA HILL FARM situated approximately thirty-five kilometres South West of HomaBay Town, HomaBay County.
 - d. A judicial review order of *mandamus* compelling the 2nd Respondent to degazette the suit land as forest land.
 - e. Any other order, declaration, writ or remedy or redress the Honourable court may deem fit and convenient taking all the circumstances of this case into account.
 - f. Costs of the suit to be provided for
2. The petition is rooted in the 1st petitioner’s affidavit of thirty-two paragraphs sworn on even date and annexed documents namely OGO-1, OGO-2 and OGO-3 which are an authority, a list of persons allocated the land and gazette notice respectively.
3. In summary, the petitioners’ lamentation is that they have occupied and lived on the land in dispute for over 100 years and this has created legitimate expectations that they cannot be evicted as they have acquired prescriptive rights thereon over the time. That by the respondents have purported to evict them from the land in question as per gazette notice (OGO-3) annexed to the 1st petitioner’s supporting affidavit.



4. By grounds of opposition dated 13th October 2020, the 1st, 3rd and 4th respondents opposed the petition. They deposed, inter alia, that the land in dispute herein is public land namely a forest hence not available for personal use by petitioners.
5. The 2nd respondent was made aware of this petition as disclosed in in affidavit of service sworn on 15th September 2020 by William Morara Ogwara, an authorized process server. Be that as it may, the 2nd respondent did not respond to the petition.
6. Originally, the petition was filed at Migori Environment and Land Court. On 18th October 2021, it was transferred to this court for hearing and determination in the spirit of Articles 6 (3) and 48 of the Constitution of Kenya, 2010.
7. Pursuant to this court’s directions of 16th November 2022, the petition was heard by way of written submissions.
8. By the way, the petitioners’ submissions dated 8th October 2021 and filed on 13th October 2021 relate to the petitioners’ application by way of chamber summons dated 28th August 2020 for conservatory orders and simultaneously filed with the petition. The same was determined by way of the ruling rendered on 22nd June 2022.
9. Besides, the parties failed to file any submissions herein.
10. So, have the petitioners proved their allegations in the petition to the requisite standard to entitle them to the orders sought in the petition?
11. The petition was mounted pursuant to the provisions of the Constitution of Kenya, 2010, inter alia; Article 22 (1) which stipulates;

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”
12. It is noteworthy that under section 13 (3) of the Environment and Land Court Act, 2015 (2011), this court has the mandate to entertain this petition; see United States International University-v-Attorney General (2012) eKLR.
13. The 1st, 3rd and 4th respondents opposed the petition and asserted that they are in possession and occupy the land in dispute. Section 12 of the Land Act, 2016 (2011) provides for allocation of public land by national or county government after being satisfied that it is necessary to allocate the whole or part of a specified public land and submit the request to the Nation Land Commission by public request of the proposals, among other ways.
14. More fundamentally, the term “public land” has been assigned meaning under Article 62 of the Constitution of Kenya, 2010. The Article sets out how the said land shall vest, classified and disposed of.
15. Having thoroughly examined the list (OGO-3) annexed to the affidavit in support of the petition, issues of full particulars, origin and authenticity, arise therein. Thus, the said list is drawn into question.
16. Various orders, inter alia, a permanent injunction are sought at the foot of the petition. Section 13 (7) (a) of the Environment and Land Act, 2015 (2011) mandates this court to grant permanent preservation orders. An injunction is envisaged thereunder and the same is an equitable and discretionary remedy which is at the sole discretion of the trial judge and depends on the circumstances of each case as held in National Bank of Kenya Ltd-v-Shimmers Plaza Ltd (2009) KLR 278 at 283.



17. Further, the case of *Nguruman Ltd-v-Jan Bonde Nielsen and 2 others* (2014) KLR cited *Giella-v-Cassman Brown & Co. Ltd* (1973) EA 358 and set out the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.
18. In the foregone, the move by the respondents by the Legal Notice (OGO-2) accompanying the affidavit in support of petition has not violated the rights and fundamental freedoms of the petitioners. Clearly, this is in line with respectful of the environment as stated in the preamble to the *Constitution* of Kenya, 2010, Article 69 of the same Constitution on the obligations in respect of the environment, section 18 (a) (iv) of the *Environment and Land Court Act*, 2015 (2011) regarding intra-generational and inter-generational equity, among other provisions of the *Constitution* and the law.
19. It is noted that section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya defines the term “suit” as infra;

“suit” means all civil proceedings commenced in any manner prescribed.
20. In conclusion, the petitioners commenced the petition in the manner prescribed. However, they have failed to avail any evidence to establish their claim on a balance of probabilities; see also *Kirugi and another-v-Kabiya and 3 others* (1987) KLR 347.
21. Thus, the instant petition is hereby dismissed.
22. As regards costs, I am guided by the case of *Samwel Kamau Macharia and another-v-Kenya Commercial Bank and 2 others* (2012) KLR.
23. Given the character of this petition, each party to bear it’s own costs.

DATED AND DELIVERED AT HOMA BAY THIS 24TH DAY OF JULY 2023

G.M.A ONG’ONDO

JUDGE

Present

1st and 2nd petitioners

Okello, Court Assistant

