



Odwar & 2 others (Suing for themselves and on behalf of the 92 Allottees from Thessalia and Jaber Informal Settlement Schemes) v Ministry of Land & Physical Planning & 2 others (Environment & Land Case E050 of 2021) [2023] KEELC 21148 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21148 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E050 OF 2021
E ASATI, J
OCTOBER 26, 2023
IN THE MATTER OF: THESSALIA AND JABER
INFORMAL SETTLEMENT SCHEMES IN MUHORONI.
IN THE MATTER OF: KIBIGORI PLANTATIONS
SETTLEMENT SCHEME IN MUHORONI DISTRICT.

BETWEEN

DALMAS OTIENO NYAGE ODWAR 1ST PLAINTIFF
JANES ODHIAMBO NYINGORE 2ND PLAINTIFF
SOLOMON MUSA 3RD PLAINTIFF
SUING FOR THEMSELVES AND ON BEHALF OF THE 92 ALLOTTEES FROM
THESSALIA AND JABER INFORMAL SETTLEMENT SCHEMES

AND

MINISTRY OF LAND & PHYSICAL PLANNING 1ST DEFENDANT
MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT

JUDGMENT

Introduction

1. Vide the Complaint dated 7th December, 2021, the Plaintiffs on their own behalf and on behalf of 92 others, describing themselves as allottees of Thessalia and Jaber Informal Settlement Schemes, sued the Defendants for orders that;



- a. The defendants be compelled to ensure that the Plaintiffs get vacant possession of their plots at Kibigori Scheme, in Muhoronimeasuring 73.6 Hectares.
 - b. In the alternative, the Plaintiffs to be compensated for the market value of their land measuring 73.6 Hectares at Kibigori Plantations Settlement Schemein Muhoroni.
 - c. The court be pleased to issue Declaratory orders that the Defendants have been in breach of the Plaintiffs' economic and social rights as envisaged under Article 43 of the Constitution of Kenya 2010.
 - d. The Plaintiffs be compensated for the breaches of their fundamental rights in the Bill of Rights.
 - e. Cost of the suit.
2. Upon service with Summons to Enter Appearance, the 1st and 2nd Defendants filed statement of defence dated 13th October, 2022 and the 3rd Defendant filed a Memorandum of Appearance dated 19th January, 2022.
 3. On 9th of February 2023, the matter was by consent of the 1st and 2nd Defendants and the Plaintiffs fixed for hearing of the main suit on 30/5/2023. On 30th May, 2023, only the Plaintiffs were present for the hearing. Affidavit of service sworn by Cosmas Oyoo Laja a Court Process Server on 13th April, 2023 showed that the 3rd Defendant was served with a hearing notice dated 10th February, 2023 for hearing of the case on 30th May, 2023. Because all parties were aware of the hearing date, the matter proceeded to hearing on 30th May, 2023 in the absence of the Defendants.

Plaintiff's Case

4. The Plaintiffs' case as contained in the Plaint is that the Plaintiffs filed the claim on their own behalf and on behalf of 51 allottees from Thessalia and 41 allottees from Jaber Informal Settlement Schemes hence making a total of 92 allottees who allegedly, gave authority to the present Plaintiffs to the file suit.
5. That the Thessalia Plaintiffs are descendants of the original about 180 families who lived at the foot of Buru Hill since about 1908 which parcel was acquired by a Greek white settler named MARGATIS around 1942 and after independence, were given a portion thereof registered as land parcel LR 3979/2 measuring about 392 acres known as THESSALIA.
6. That the process of alienation of the land to the Thessalia squatters was a government project officially sanctioned by the government but lethargy was manifest in its full implementation. That the squatters were attacked by arsonists from rival community and their houses torched, property destroyed, and that the then Kericho DC on 13th December, 1993 led a contingent of armed men who destroyed their homes and property and hence they became internally displaced persons in Kenya.
7. That later the process of re-settlement of the Thessalia squatters was taken up by former president Daniel Toroitich Arap Moi as a result of which the Thessalia Internally Displaced persons were ultimately allocated land parcel in Kibigori Plantation Schemeby the Settlement Fund Trustee after issuance of Letters of Offer on 9th January, 2013.
8. That however it has been a challenge accessing the parcels of land or even establishing the boundary demarcations thereof as there are people farming and utilizing the parcels and resisting grant of vacant possession to the Plaintiffs. That the Thessalia internally displaced persons have lodged formal complaint to the National Land Commission, the County Government of Kisumu, the County Commissioner and the Chairperson of the Complaints Resolution Committee of the Ministry of



Lands, Housing and Urban Development on the delay in resettling the internally displaced persons on the parcels.

9. That the Plaintiffs from Jaber Informal Settlement Scheme are squatters and descendants of workers in the white settlers farms, particularly, those owned by AOGA who was into brick making and maize farming. That these squatters were displaced at Independence and moved to the Lake Basin Development Authority veterinary land from which they were evicted in 1986 by the Provincial Administration and their houses destroyed. That they made application for allocation of alternative land and were allocated parcels at the Kibigori Plantation Settlement Scheme in Muhoroni District.

10. That the Jaber squatters were subsequently settled in Special Purpose P.No.42 which was reserved as Muhoroni Center which was land that was earmarked for a school, church and health centre which occasioned the District Land Adjudication and Settlement Officer Nyando District recommend that they be allowed alternative land.

That they were later allocated parcels of land at Kibigori Plantation Scheme by the Settlement Fund Trustees (SFT) and were issued with Letters of Offer on 9th January, 2013 and some of them have acquired title deeds despite the fact that it has not been possible to access the lands.

11. Each family paid Kshs.10,120/- for two (2) acres but they have not been able to move to the land due to hostility from the current developers, the Nyangore Squatters who say they have lived thereon for over 40 years.

12. That the cost of one acre of the land at Kibigori Plantation Scheme is Kshs.1,000,000 thereby placing the entire parcel claimed by the Plaintiff at a market value of Kshs.184,000,000/=.

13. That the three Defendants are public entities which have exerted a legitimate expectation upon the squatters in reference to the allotted parcels at the Kibigori Plantations Scheme.

14. The plaintiffs relied on a decision of the Supreme Court of Canada in Canada (Attorney General) – vs- Mavi [2-17]2 S.C.R 504 where the court stated that;

“Where a government official makes representations within the scope of his or her authority to an individual about an administration process of that the government will follow, and the representation said to give rise to the legitimate expectations are clear unambiguous and unqualified, the government may be held to its word provided the representation are procedural in nature and do not conflict with the decision maker of statutory duty. Proof of reliance is not a requisite.”

15. The Plaintiff itemised what they consider to be the particulars of breach of their fundamental rights by each of the Defendants and pleaded that the court is seized with authority to deal with historical injustices claims as held in the case of Chief Land Registrar and 4 Others –vs- Nathan Tirop Koech & 4 Others where it was held, inter alia, that there is nothing in the 2010 Constitution or the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustices.

The Plaintiffs therefore sought for intervention of the court in terms of the relief highlighted at the beginning of this judgement.

The Evidence

16. Three witnesses were called to testify on behalf of the Plaintiffs. PW1 was Dalmas Otieno Nyange Oduor, the 1st Plaintiff herein. He adopted the contents of his earlier filed witness statements as his



evidence. The contents of the statements are the same as the contents of the plaint. He stated that he filed the claim as a representative suit for both the Plaintiffs named in the plaint and on behalf of the ninety-two (92) allottees from Thessalia and Jaber Informal Plantation Settlement Scheme in Muhoroni who were to be settled at Kibigori Plantation on parcels measuring about 0.8Ha each totalling to 73.6Ha. for which Letters of Offer were issued, some have obtained title deeds but for security reasons, it has not been possible for them to be shown the plots' boundaries and even take occupation. That the Plaintiffs have on many occasions given notice to the Defendants of intentions to sue for purposes of securing their rights the latest being a letter dated 31st August, 2021 written on the Plaintiffs' behalf by Kituo Cha Sheria.

17. PW1 produced 14 exhibits as listed in the Plaintiff's list of documents dated 7th December 2021 as follows: Authority given by the 92 Plaintiffs to the current Plaintiffs to file this suit exhibits P. 1 (a) and 1 (b). Letters by the Commissions of Land J.R. Njenga dated 30th June, 1987 and the one by District Land Officer, Onyiro Makori dated 22nd September, 1993 exhibits P.2 (a) and 2 (b). A copy of daily Nation Newspaper dated 14th December, 1993 exhibit P.3. The Human Rights Watch Report published in 1993 exhibit P.4. Letter dated 22nd January, 2000 by Hon. Raila Odinga, Letter dated 12th March, 2003 by Chair Thessalia, letter dated 2nd April, 2003 from Permanent Secretary, Office of the Vice President, letter by Hon. James Orengo, Minister for Lands dated 20th August, 2008 exhibits P. 5(a), (b), (c) and (d) respectively. Letter dated 18th May, 2016 by Chair, National Land Commission, Prof. Muhammed Swazuri exhibit P.6. Four letters dated 14th March, 2016, 16th January, 2015, 10th February, 2015 and 1st March, 2016 exhibits P.7(a), (b), (c), (d) respectively. The Sunday Standard report by Dalton Nyakundi of 10th August, 2016 exhibit P.8. The Sunday Standard by Prof. Anyang' Nyong'o dated 9th August, 2015 exhibits P.9. Bundles of documents evidence of Letters of Offer, Receipt of payments and title deeds for the 92 Plaintiffs exhibit P.10. The Notice of Intentions to sue by Kituo Cha Sheria – exhibit P.11. application by Jaber Squatters dated 15th September, 1999, the acknowledgement by the Commissioner of Land dated 21st August, 2006 and letter from the desk of then Minister of Lands James Orengo dated 19th February, 2008 exhibits P.12(a), (b) and (c) respectively. Letter from Nyando Director Land Adjudication Settlement Officer dated 2nd April, 2009 recommending alternative site exhibit P.13. And the valuation report for the approximately 73.6Ha at Kibigori Plantations Settlement Scheme, exhibits P.14.
18. PW2 was Solomon Musa, the 3rd Plaintiff herein. He adopted the contents of his witness statement filed earlier, as his evidence. The contents of his witness statement are the same as the contents of the plaint. He stated that he was among the Plaintiffs from Jaber Informal Settlement Scheme.
19. PW3 was one Nobert Kisanya, a land valuer. He testified that he undertook the assessment of the Thessalia and Jaber Informal Settlement Scheme plots at Kibigori Plantation Scheme. That basing his assessment on market value he established that the properties retailed at Kshs.750,000/- per acre. That for each of the claimant owning 2 acres the entitlement was Kshs.1.5 Million totalling to Kshs.138 million for the 92 claimants. He produced a valuation report dated 26th May, 2023 as exhibit P.14.

Evidence by the defence

20. The 1st and 2nd Defendants adduced no evidence but had filed a joint defence dated 13th October, 2022. In the joint defence, they denied the Plaintiffs' claim and put them to strict proof thereof. They stated that the 1st Plaintiff was also a Petitioner in Kisumu Elc Petition No. E20 of 2021 on behalf of persons within Swahili village, Bondeni and Shauri Moyo within Muhoroni town in which judgement was delivered on 15th July, 2022 raising the concern of him being a frivolous and vexatious litigant.



21. The 1st and 2nd Defendants denied the market value of the parcels claimed by the Plaintiffs at Kshs184,000,000 and particulars of breach itemized in the plaint. They prayed that the suit be dismissed with costs.
22. Apart from the Memorandum of Appearance dated 19th January, 2022 the 3rd Defendant filed no other pleadings and adduced no evidence.

Submissions

23. At the close of the Plaintiffs' case, directions were given that parties file written submissions on the case.
24. Written submissions dated 6th July, 2023 were filed by the firm of Amondi & Company Advocates on behalf of the Plaintiffs.
25. The first issue that Counsel discussed in the submissions is whether or not the Plaintiffs are the legitimate owners of suit plots at Kibigori Plantation Settlement Scheme in Muhoroni measuring in total about 73.6 Hectares. Counsel submitted that the allocation of the suit parcels at the Kibigori Plantation Scheme to the 92 Plaintiffs was done procedurally by the Settlement Fund Trustee (SFT) wherein the plaintiffs applied and were issued with Letters of Offer on 9th October, 2013.

That the Settlement Fund Trustee focuses on the settlement of the landless poor in projects funded by government budget allocation. That this is with the aim of enhancing socio-economic development through provisions of land security of tenure, food security and creation of employment in order to alleviate poverty in the country. That land for settlement is acquired through setting apart of Trust or government land purchased from private owners.

26. That the 92 Plaintiffs are the legitimate owners of the suit parcels measuring 73.6 Hectares at Kibigori Plantation Settlement Scheme in Muhoroni. The same being part of the settlement program for the landless/internally displaced persons through provisions of land and security of tenure through the Settlement Fund Trustees. That some of the Plaintiffs have already secured title deed conferring independence and absolute proprietorship under sections 25 and 26 of the Registration of [Land Act](#), Cap.300 Laws of Kenya and protected under Article 40 of [the Constitution](#) of Kenya.
27. The second issue discussed is whether or not the Plaintiffs have been denied occupation of the suit plots being Kibigori Plantation Settlement Scheme in Muhoroni with the connivance or negligence and/or instance of the Defendants. Counsel submitted that despite being re-settled at the Kibigori Plantations Scheme on parcels measuring about 0.8 Ha each and totalling about 73.6 Ha, for security reasons it has not been possible for the Plaintiffs to be shown the plot boundaries and take occupation. That some unknown individuals are in actual occupation, utilizing the parcels and resisting grant of vacant possession to the Plaintiffs. That the chairman of National Land Commission acknowledged this fact vide letter dated 18th May, 2016 and asked County Commissioner, Kisumu for adequate security for enforcement. That the County Commissioner, Kisumu declined the directive to offer security.
28. The third issue raised by the Plaintiffs and submitted on by counsel is whether or not they (Plaintiffs) have experienced breach in their fundamental rights in the Bill of Rights. Counsel submitted that the Plaintiffs' economic rights have been breached contrary to Article 43(1) of [the Constitution](#) of Kenya in that they have been denied their proprietary rights to land and therefore accessible and adequate housing. That the Defendants have failed to accord the Plaintiffs fair administrative action as provided for under Articles 47(1) and 232(1)(c) of [the Constitution](#). Counsel relied on the case of *Mitu Bell Welfare Society –vs- Kenya Airports Authority and 2 Others* and submitted that the Plaintiffs' rights



under Article 29(c) of *the Constitution* have been compromised by the 2nd Defendant failing to provide the Plaintiffs security of the person.

That the Defendants are under a duty to ensure that they act promptly to protect the Plaintiffs' right to property. That the 3rd Defendant has failed to ensure the effecting of Section 6(2)(c) of the *National Land Commission Act* and Article 60(1)(a) and (b) of *the Constitution* by ensuring that the holding, usage and sustenance of land in Kenya is done in a way that guarantees the Plaintiffs' equitable access to their lands and security of their land rights.

29. Fourthly, the Plaintiffs raised the question of whether or not the Plaintiffs are entitled to compensation both for the market value of their land measuring 73.6 Ha at Kibigori Plantation Settlement Scheme, Muhoroni and for the breaches of their fundamental rights in the Bills of Rights. Counsel relied on the pleadings and the valuation report produced as exhibit. The valuation report placed market value of the land at Kshs.138,000,000/-. Counsel urged the court to assess the general damages for breach of the Petitioners' right at Kshs.500,000/- for each of the 92 Plaintiffs making an aggregate of Kshs.46,000,000/- hence making consolidated award of Kshs.184,000,000/-.

Counsel relied on a number of authorities in decided cases to support this submission.

30. On costs, counsel prayed that in the circumstances of the case, costs be awarded to the Plaintiffs.

Issues for Determination

31. The Plaintiffs in their written submissions set out the following as the issues for determination herein: -
- a. whether or not the Plaintiffs are the legitimate owners of the suit plots at Kibigori Plantations Settlement Scheme in Muhoroni in total measuring 73.6Ha.
 - b. whether or not the Plaintiffs have been denied occupation of the suit plots being Kibigori Plantations Settlement Scheme in Muhoroni with the connivance or otherwise at the negligence and or instance of the Defendants.
 - c. Whether or not the Plaintiff have experienced breaches in their fundamental rights in the Bill of Rights.
 - d. Whether or not the Plaintiff are entitled to compensation both for the market value of their land measuring 73.6Ha at Kibigori Plantations Scheme in Muhoroni and for the breaches of their fundamental rights in the Bill of Rights.
 - e. Costs.

I adopt these as the issues for determination herein in addition to the issue of who are the plaintiffs herein.

Analysis and Determination

32. This court is enjoined by the provisions of Order 21 Rule 4 Civil Procedure Rules, 2010 to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue.
33. The first issue for determination herein is who the plaintiffs are in this suit. The suit is described in the plaint as a representative suit filed by the three plaintiffs who are named as the 1st to 3rd plaintiffs in the plaint on behalf of themselves and 92 others. This should make a total of 95 people. However, throughout the plaint, evidence and submissions, reference was made to the 92 plaintiffs. In computing



the total acreage of land claimed and the damages claimed the plaintiffs applied the figure of 92 plaintiffs.

34. It was the plaintiffs' case that the 92 plaintiffs gave the three named plaintiffs authority to file the suit. To prove this the plaintiffs produced as exhibit P. 1 (a) and 1 (b) which was said to be the authority to sue. I have read these exhibits. Exhibit P.1(a) has a list of 64 people. Of these only 46 signed the list. Exhibit P.1(b) has a list of 41 people signed by all of them. This makes a total of 87 and not 92 people who signed the authority to sue.
35. It was also the plaintiffs' case that all the 92 plaintiffs had been given Letters of Offer and others title deeds and had paid the requisite outright purchase monies for the parcels of land allotted to them. Perusal of exhibit P.10 (bundle of Letters of offer, title deeds and payment receipts) shows that of the 87 people who signed the authority to sue, only 46 have letters of offer with only 2 of the 46 for whom title deeds had been processed. For purposes of this judgement, I find that the people who fit in the description of the plaintiffs as given in the plaint are the 46. These are the people who have exhibited Letters of Offer or title deeds and receipts for payment. These are:

Name of Allottee IDNo. Plot No.

1. Dalmas O. Odwar 11368175 115
 2. James Goro 2449917 433
 3. Maurice Ochieng 23607409 94
 4. Benard Otieno Juma 23396650 81
 5. Corneliusen Ochieng Okoth 22259198 19
 6. Kolisto Odhiambo Mbuya 23290520 55
 7. Alfred Obuya Ayieko 0501160 165
 8. Patricia Aoko Okoth 2582805 204
 9. Charles Kech 6434045 184
 10. Grace Atieno Otieno 20303983 387
 11. Gondi Joel Odhiambo 11230011 43
 12. Yonnah Ochieng & Benjamin Obura 11045187 452
24811959
 13. Petro Ochieng Okumu 20122939 241
 14. Peter Oliech Okinyi 11475837 289
 15. Leonard Oluoch Onyango 47114885 10
 16. Hellen Akinyi Ogega 2755035 473
 17. Joseph Owuor 2578457 441
 18. Rose Akinyi 3471708 429
- Name of Allottee ID No. Plot No.
19. Peter Ngeso 2547067 427



20. Wilkista Atieno 8017075 420
 21. Janes Odhiambo 8199914 435
 22. Cecelia Akumu 7162468 382
 23. Daniel Juma 9590049 460
 24. Peter Oseno 2553806 428
 25. Leotina Atieno 9434474 128
 26. Peter Otieno Owuo 4709947 436
 27. Joseph Ouma 30096228 355
 28. Mariko Anyango Lusi 20887779 288
 29. Markus Ochele 2580534 388
 30. Philip Ngeso Jabuya 2286576573 418
 31. Festo Omondi Ondego 23875304 30
 32. Blasto Ogada Abwajo 2582789 162
 33. Julius Odhiambo Elkana 2795872 140
 34. Stephen Ngidha 9386621 97
 35. John Okeyo 11298135 76
 36. Joseph Ojwang Onyango 0074003 64
 37. Joseph Ondego Oguche 2583835 146
Name of Allottee IDNo. Plot No.
 38. Peterssa Onyango Ojwang 21807794 56
 39. Justice Tela Ketch 21809133 21
 40. Alice Akinyi Nyang'oro 21816258 89
 41. David Oketch Onyango 5219164 198
 42. Paul Odwory Oketch 2299173 93
 43. Elija Ayway 14587991 430
 44. Leah Achieng Odhiambo 28352247 262
 45. Erick Odhiambo Ketch 13009829 95
 46. Wilfrida Olello Mbeche.13105160 197
36. The next issue for determination is whether or not the Plaintiffs are the legitimate owners of the suit plots at Kibigori Plantations Settlement Scheme in Muhoroni measuring 73.6Ha. The case of the Plaintiffs is that after the long process by government and government agencies, the Thessalia Internally Displaced Persons were allocated land parcels in Kibigori Plantation Scheme by issue of



- Letters of Offer on 9th January, 2013. And that the Jaber Squatters were also allocated land parcels at the same scheme on the same date and that some have acquired title deeds to the parcels allocated them.
37. That each of the 92 families paid Kshs.10,120 for two acres.
- The basis of the Plaintiffs' claims of ownership of the land totalling to 73.6Ha is the Letters of Offer dated 9th January, 2013 and the title deeds they hold.
38. I have carefully read the Letters of offer. They were addressed to the allottees and signed by the Director of Land Adjudication and Settlement. They are printed on the letter head of the 1st Defendant. Like most Letters of Offer, the Letters of Offer in the present case were conditional and required the recipient to;
- i. report to the Project Manager Kibigori Plantations to be shown the plot and be issued with a letter confirming
 - ii. pay 100% of the outright purchase shown in the letter of offer within a period of 90 days from the date of the letters.
39. The 46 allottees have receipts for payment of either the entire or part of the outright purchase monies as demanded in the Letters of Offer. The Defendants and more particularly the 1st Defendant did not disown the Letters of Offer or deny that payments were made by the 46 claimants and accepted by the 1st Defendant as directed in the Letters of Offer.
40. There is no evidence that 73.6 Ha of land was allotted to the claimants. The 46 Letters of offer and title deeds at 0.8 Ha for each of the claimants amounts to approximately 36.8 Ha.
41. Case law now abound on the significance of allotment letters or Letters of Offer. In *Philma Farm Produce & Supplies & 4 Others –vs- The Attorney General & 6 Others* [2012] eKLR it was held
- “the petitioners’ claim is grounded on 2 letters of allocation of the suit properties. These letters do not confer proprietary rights but only a right to receive property or to be allowed on complying with terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with ordinary rules and contracts.... it is in this respect that the Petitioners’ claim must fail.....”
42. The Supreme Court affirmed this position in the recent decision of *Torino Enterprises Limited –vs- Attorney General* by holding that an allotment letter is incapable of conferring interest in land being nothing more than an offer awaiting the fulfilment of conditions stipulated. That an allottee in whose name the allotment letter is issued must perfect the same by fulfilling the conditions therein.
43. The Plaintiffs confirm that they have not been able to access the lands or even be able to know the boundary demarcations for the land they claim. Their case is that there are unknown individuals who seem to be having the backing of powerful forces who are in occupation of the lands. That in addition, they have been unable to move to the lands due to hostility from the current dwellers, the Nyangore squatters who claim that they have lived there for over 40 years.
- I find no basis to hold that the claimants who hold Letters of Officer are the legitimate owners of the suit lands. Letters of Offer do not confer proprietary interest in land.
44. There are however 2 of them who hold title deeds namely; Peter Oseno Ojwang ID NO. 2553806 title NO. KISUMU/KIBIGORI PLANTATION/ 428 and James Odhiambo Nyingore ID NO.8199914 title NO. KISUMU/KIBIGORI PLANTATION/ 435. Under section 24, 25 and 26 of the [Land](#)



Registration Act, certificate of title is evidence of ownership. The Defendants did not produce any evidence or make any attempts at all to impeach these titles.

45. The second issue for determination is whether the Plaintiffs have been denied occupation of the suit lands. The Plaintiffs pleaded that though they have the Letters of Offer and title deeds, they have not had access to the suit lands. The National Land Commission vide its letter dated 18th May, 2016 asked the County Commissioner to provide security with a view to assisting them take possession. That the County Commissioner response was that the dispute over the land was beyond security and urged the National Land Commission chairman Muhammed Swazuri to settle the ownership dispute first.
46. Considering all the facts of the case as presented by the Plaintiffs, I find that there is evidence that the land offered to the Plaintiffs was unavailable on the ground for their occupation. It is the evidence of the Plaintiffs that the land was occupied by the Nyangore squatters who had been in occupation for more than 40 years and other powerful individuals who resist the attempts to give the land to the plaintiffs. The plaintiffs have never seen the parcels of land on the ground.
47. The third issue is whether or not the Plaintiffs have experienced breach in their fundamental rights in the Bill of Rights. The Plaintiffs pleaded in paragraph 30 of the Plaint that the three Defendants are public entities which have exerted legitimate expectation upon the Plaintiff in reference to the allotment of parcels of land at Kibigori Plantation Settlement Scheme. The Plaintiffs particularized the breach of the 1st Defendant as; Entering into, evicting and destroying the plaintiffs' properties in portions of the suit parcel while aware that the question of ownership is still pending the determination by the National Land Commission. Compromising the plaintiffs' economic and social rights contrary to Article 43(1) of Constitution by denying the Plaintiffs their proprietary rights to land so as to enable accessible and adequate housing.
- * Failing to accord the plaintiffs fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair contrary to Article 47 of the Constitution.
 - * Violating the plaintiffs' legitimate expectations by representing the validity of their titles but failing to ensure that they enjoy the rights appurtenant thereto.
 - * Failing to give responsive prompt and effect determination of the plaintiffs' complaint contrary to Article 232(1)(c) of the Constitution which imposes the said values and principals of public service upon all state organs.
48. And as against the 2nd Defendants, the Plaintiffs particularized the breach as; compromising Article 29(c) of the Constitution by failing to provide the Plaintiffs security of the person which included the right not to be subjected to any form of violence from either public or private sources.
- * failing to provide the Plaintiff with security so as to protect their right to property as envisaged under Article 40(1) of the Constitution.
 - * failing to give responsive, prompt and effect determination of the Plaintiffs' complainant contrary to Article 232(1)(c) of the Constitution which imposes the said valued and principles of public service upon all state organs.
49. Against the 3rd Respondent, the Plaintiffs claimed that the 3rd Respondent failed to ensure the effecting of Section 6(2)(c) of the National Land Commission Act and Article 60(1)(a) and (b) of the Constitution by ensuring that the holding, usage and sustenance of land in Kenya is done in a way that guarantees the Plaintiffs equitable access to their land and security of their land rights.
50. Though there is evidence that the case of the plaintiffs was taken up by government for their resettlement, I find no evidence that the 2nd and 3rd Defendants were involved in the process leading



to the issue of Letters of Offer and title deeds to the Plaintiffs. The evidence on record however shows that the 1st Defendant accepted the plaintiffs' request for allotment of land and offered them land through the issue of Letters of Offer. There is evidence that the Plaintiffs paid the monies demanded in the Letters of Offer. The 1st Defendant processed title deeds for 2 of the plaintiffs and there is no evidence that the 1st defendant thereafter took any further step to complete the process or terminate it lawfully. Since the date the Letters of Offer were issued to the date of filing this suit a period of 8 years or thereabouts had elapsed. The plaintiffs submitted that the Defendants being government entities, gave them legitimate expectation that they were finally going to be settled.

51. Article 47 of *the Constitution* provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedural. In this case I find that by its inactivity either to complete the process and settle the Plaintiffs or terminate it lawfully, thereby holding the plaintiffs in limbo the 1st Defendant breached the plaintiffs' right to fair administrative action.
52. Article 43 of *the constitution* provides for the economic and social rights that every person is entitled, inter alia, to accessible and adequate housing and to reasonable standards of sanitation and to social security. I find that by failing to settle the Plaintiffs who had been identified as internally displaced persons and therefore landless people, even after issuing them with Letters of Offer and accepting payment for the same as demanded, the 1st Defendant breached the plaintiffs' rights under article 43 of *the constitution*.
53. In *Gitobu Imanyara & 2 others vs Attorney General [2016]eKLR* the Court of Appeal held

“consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by the state or the government are reliefs under public law within the jurisdiction of the trial court...”

The primary purpose of constitutional remedy is not compensating or punitive but to vindicate the rights violated, to prevent or defend or deter any future infringement. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of damages may be called for in addition to the declaration.”

54. In the circumstances of the instant suit namely; the claimants are landless internally displaced persons who have for the last 8 years lived with the expectation of eventually getting land to settle, an award of damages in addition to the declaration will in my view vindicate the breach. The 1st Defendant did not adduce evidence to controvert the Plaintiffs' case.
55. The prayers sought in the Plaint were for:
 - a. An order compelling the Defendants to ensure that the Plaintiffs get their land measuring 73.6 Ha at Kibigori. The court has found that there is no evidence that 73.6Ha of land was allotted to 92 plaintiffs. The court has also found that though some of the claimants hold title deeds, the land represented in those title deeds is either unavailable or unknown on the ground. Hence an order compelling surrender of occupation is not appropriate in the circumstances.
 - b. In the alternative, the plaintiffs prayed to be compensated for the market value of the land. On the basis of the findings, it only the claimants with title deeds who are entitled to compensation for the land at Kshs.750, per acre as per the valuation report
 - c. The plaintiffs also sought for a declaration that their constitutional rights under article 43 have been violated. I find that the claimants are entitled to this relief.



- d. The other relief sought is that the plaintiffs be compensated for breach of their fundamental rights in the Bill of rights. I find that the Plaintiffs are entitled to damages for the breach.
 - e. Costs of the suit. The law in section 27 of the *Civil Procedure Act* is that costs follow the event.
56. For the foregoing reasons, I find that the 46 plaintiffs named herein have proved their case on a balance of probabilities and enter judgement in their favour against the 1st Defendant for:
- a. Compensation for the lands comprised in title numbers Kisumu/Kibigori Plantation/428 in the names of Peter Oseno Ojwang and Kisumu/Kibigori Plantation/435 in the name Janes Odhiambo Nyingore at Kshs.750,000 per acre as per the valuation report.
 - b. A declaration that the fundamental rights of the 46 plaintiffs listed in this judgement have been breached by the 1st Defendant.
 - c. Damages for breach of fundamental rights of the 46 Plaintiffs listed in this judgement at Kshs.500,000/ each.
 - d. Refund of the outright purchase monies paid by each of the 46 Plaintiffs as per the payment receipts they hold.
 - e. Costs of the suit.
- Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26TH DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen Court Assistant.

Nyambeki for the Plaintiffs.

No appearance for the Defendants.

