



**Kuwam & 5 others v Cabinet Sec. Min. of Defence & 5 others (Environment & Land
Petition 004 of 2021) [2023] KEELC 21791 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND PETITION 004 OF 2021
PM NJOROGE, J
NOVEMBER 27, 2023**

BETWEEN

**JOSEPH LORUNYEI KUWAM 1ST PETITIONER
JOHN OYAN LUSURU 2ND PETITIONER
JOYCE NAIREZIA LESEGI 3RD PETITIONER
ALI HASSAN MOHAMMED 4TH PETITIONER
KURESHA BILLE MOHAMMED 5TH PETITIONER
MARY KEPEN MBATIA 6TH PETITIONER**

AND

**THE CABINET SEC. MIN. OF DEFENCE 1ST RESPONDENT
THE CABINET SEC. MIN. OF INTERIOR & CONDITION OF THE NATIONAL
GOVERNMENT 2ND RESPONDENT
THE COUNTY COMMISSIONER, ISIOLO COUNTY 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT
THE COUNTY GOVERNMENT OF ISIOLO 5TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF
KENYA 6TH RESPONDENT**

RULING

1. This ruling concerns 2 applications. The first application which was filed by the Petitioners is dated 10/6/2022. The second one filed by the 1st respondent is dated 16/11/2022.



2. The Petitioners application dated 10/6/2022 seeks the following orders;
 1. That the Honourable Court be pleased to hear prayer 2 here below ex parte in the first instance due to urgency.
 2. That the Honourable Court be pleased to issue an interim conservatory order restraining the respondents by themselves, their agents and/or servants from continuing with any construction of new buildings/projects on the suit land pending the hearing and determination of the application.
 3. That the Honourable Court be pleased to issue an interim conservatory order restraining the respondents by themselves, their agents and/or servants from continuing with any construction of new building/projects on the suit land pending the hearing and determination of the petition herein.
 4. That the Honourable Court be pleased to cite the 1st Respondent/The Commandant School of Infantry, Isiolo/Army General/Brigadier in charge of the School of Infantry/Officers and or agents for contempt of court for breaching the status quo order issued by the Honourable Court on 19/5/2021
 5. That the Honourable Court be pleased to give such further or better reliefs as it may deem fit and just to.
 6. That the costs of this application be provided for.
3. The application is supported by the affidavit of Joseph Lorunyei Kuwam and has the following grounds;
 - a. That on the filing of this petition dated 4th October, 2019 interim orders were issued to the effect that:

“A conservatory order be and is hereby issued restraining the respondents by themselves, their agents and/or servants from evicting the applicants, and the more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo communities within Burati Ward Isiolo County that they represent; from their ancestral land measuring approximately 350 square miles that comprise Burat Ward Isiolo County pending the hearing and determination of the application herein”
 - b. That by consent the orders herein were confirmed by all parties, and they remain in force pending the hearing and determination of the Petition
 - c. On 19th May, 2021 the Honourable Court ordered that there be an order for status quo pending the hearing and determination of the petition.
 - d. That in a move to change the status quo, the 1st Respondent through its officers (Kenya Defence Forces) and or agents have commenced construction of buildings on the suit land.
 - e. That the officers at School of Infantry, Isiolo Camp should be cited for contempt for the breach of the status quo orders.
 - f. That the orders were issued in the presence of the 1st Respondent’s counsel and all parties were aware.



- g. That the clear defiance of these orders is only meant to embarrass this court before the eyes of the public.
 - h. That if the orders herein are not granted the matter will be convoluted and the petition will be rendered nugatory.
 - i. That the 1st Respondent's officers, without any colour of right, have encroached on to the petitioners' ancestral land and commenced construction of new buildings outside their current occupation.
 - j. That the acts of the 1st Respondents officers continue to cause a lot of anxiety and tension on the ground.
 - k. That the communities affected in this petition own the land they occupy because it is their ancestral land/community land. They have no alternative land, and should they be evicted they shall be rendered destitute.
 - l. Unless the Honourable Court urgently intervenes, the more than 20,000 members of the affected communities would be rendered destitute and there is likelihood of bloodshed and loss of life.
 - m. Unless the court urgently intervenes the constitutional rights of the more than 20,000 members of the affected communities, including their right to property as protected under Article 40 of *the Constitution* of Kenya are in real and imminent danger of being infringed.
 - n. It is in the interest of justice to allow this application.
4. The 1st and 2nd Respondents application dated 16/11/2022 seeks the following orders;
- 1. That the Honourable Court be pleased to hear this application on priority basis.
 - 2. That the Petitioners Lack Locus Standi to file this petition generally.
 - 3. That the Petitioners lack Locus Standi to file the Petition against the 1st Respondent.
 - 4. That the Petition be dismissed/discontinued against the 1st Respondent.
 - 5. That the nature of issues herein are non-justiciable.
 - 6. That alternative remedies have not been exhausted.
 - 7. That the court lacks jurisdiction to hear this Petition.
 - 8. That the Petition herein be dismissed with costs.
5. The application is supported by the affidavit of Boniface Maina Ombiri.
6. The two applications were canvassed by way of written submissions.
7. For both applicants, the parties have canvassed the applications as if they are addressing the issues raised in the Petition itself. At this interlocutory stage I will not be driven to address issues which ought to be considered during the hearing and determination of the petition. I will ignore the parties' arguments which seem to be addressing the Main Petition. Having said that, I wish to state that I have considered all the pleadings, the authorities and the submissions proffered by the parties to buttress their diametrically incongruent assertions. I do opine that all the authorities the parties have cited are good authorities in their facts and circumstances. BUT not all cases are congruent to a degree of mathematical exactitude in their facts and circumstances. For the reason that the issues that have been



cited by the parties, by and large, address issues which ought to be considered during the hearing and determination of the Petition itself, I have elected not to regurgitate their facts and the principles of law they espouse.

By and large the submissions filed by the parties reflect what they have contained in the grounds they have proffered to buttress their applications.

8. A conspectus of the Petitioners case is that they seek a conservatory order for status quo to remain as was ordered by this court at Meru on 4/10/2019 to the effect; “A conservatory order be and is hereby issued restraining the respondents by themselves, their agents and/or servants from evicting the applicants, and the more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo communities within Burati Ward Isiolo County that they represent from their ancestral land measuring approximately 350 square miles that comprise Burati Ward Isiolo County pending the hearing and determination of the application herein”. They say that this order was by consent confirmed by all the parties and was to remain extant pending hearing and determination of this Petition.
9. They claim that the 1st Respondent has been in contempt of the apposite court order by constructing new buildings outside their current occupation. For this claimed disobedience of the court orders they pray that the 1st Respondent/Commandant School of Infantry, Isiolo/Army General/Brigadier in charge of the School of Infantry/Officers and or agents be punished for contempt of court for infracting upon the status quo order issued by the court on 19/5/2021. They also ask the court to be pleased to give such further or better orders as it may deem fit for ends of justice.
10. A conspectus of the 1st and 2nd respondents case is that;
 1. By law, the Petitioners lack the mandate to file the instant Petition owing to provisions of the [Community Land Act](#).
 2. By law, the Petitioners lack the mandate to file the instant Petition against the 1st Respondent as the land owned by the 1st Respondent is not community land.
 3. The Petitioners have not demonstrated their authority to file the instant Petition on behalf of the alleged communities or community members.
 4. The issues raised in the Petition are at face value and law non-justiciable.
 5. The Petition herein raises policy issues which are not within the purview of this Honourable Court.
 6. The Petition herein is not ripe for adjudication by this Honourable Court given the provisions of sections 33 and 35 of the [Intergovernmental Relations Act](#), and sections 39-42 of the [Community Land Act](#).
 7. Given the nature of the issues raised in the Petition herein, interests of justice are better served if the issues are resolved in other forums other than through the Constitutional Petition.
 8. The Petition at hand concerns 350 square miles of land and likely involves interests beyond the listed Petitioners, the listed Respondents and most likely affects other individuals, other private entities and Government Agencies.
 9. The Isiolo County Government has in its pleadings admittedly taken steps towards survey and adjudication of the land in dispute which is in direct conflict with national security interest



and policies particularly the section of the disputed land already in use and occupation by the Kenya Defence Forces.

10. Article 66 (1) of *the Constitution* is to the effect that the State may regulate the use of any land or interest or right over any land in the interest of defence which is a policy issue.
 11. The Petition concerns alleged historical land injustices which is at a first instance a function of the National Land Commission under Article 67 (2) (e) of *the Constitution*.
 12. The Petitions main prayers are for damages and not repossession of the land.
 13. Article 159 (2) of *the Constitution* is to the effect that alternative forms of dispute resolution are to be promoted. Article 189 (3) and (4) of *the Constitution* provide that every reasonable effort must be put to resolve intergovernmental disputes through alternative dispute resolution mechanisms. Article 67 (2) (f) provides that the National Land Commission is to encourage the application of alternative dispute resolution mechanisms in land conflicts.
 14. Sections 33 and 35 of the *Intergovernmental Relations Act*, No. 2 of 2012 and Section 42 of the *Community Land Act* provide for judicial recourse only after failure of alternative dispute resolution mechanisms.
11. I have considered the totality of the pleadings, the authorities the parties have proffered and do find as shown here below.
 12. Regarding the Petitioners application, the parties agree that a Status Quo order was issued by this court on 19/5/2021 at Meru. They only differ on its interpretation. I do note that the parties had by consent approved that order.

I am guided by the principle enunciated in the case of Kenya Airlines Pilots Association (KALPA) Versus Another [2020] eKLR, where the court held that; “a status quo is meant to preserve the subject matter as it is existed as of the day of making the order”. I do note that although the 1st and 2nd Respondents state that they are not in contempt of court, they do not dispute the claim that they have embarked on constructing buildings and structures beyond the area they were occupying when the status quo order was issued.

For this reason I will grant prayers 2 and 3 in the Petitioners’ application dated 10th June, 2022. I will give my determination regarding prayer 4, for the citing some parties for contempt, later on in this ruling.

13. Regarding prayers by the 1st and 2nd respondents in prayers 2 and 3 of their application that the Petitioners lack locus to file this Petition, I dismiss these prayers and unequivocally find that every Kenyan and every resident or a group of Kenyan and residents have got the Constitutional right to access Courts to canvass their claims that their fundamental and constitutional rights have been infringed upon. For this same reason, I dismiss prayer 5 in the 1st and 2nd Respondents’ application and find that the issues raised by the Petitioners are justiciable. For the same said reason, I dismiss prayer 4 which asks this court to dismiss the Petitioners’ Petition against the 1st and 2nd respondents.
14. Concerning the prayer that the Petitioners suit be dismissed for non-exhaustion of available remedies, I do note that at one time in 2018, at the behest of the National Land Commission, a technical team was established to thrash out the issues being raised in this Petition. However, over 4 years later, the National Land Commission has not made its determination. I also find that the failure to establish the institution mandated to handle land issues by the *Community Land Act* cannot be blamed on the Petitioners. I also find that that the Petitioners cannot be denied access to courts to prosecute their claims of being denied their fundamental and Constitutional rights and those rights cannot be



suspended by the indolence and cavalier attitudes by state institutions. I, therefore dismiss prayer 6 in the 1st and 2nd Applicants application.

15. I find prayer 7 in the 1st and 2nd Respondent's application veritably nebulous and rather skullduggerous. Of course the Environment and Land Court has the jurisdiction to hear and determine all environment and land issues. This Petition indubitably raises land issues. Unequivocally, this court has jurisdiction to hear and determine this Petition.

16. There are also two main prayers, in the alternative. The 1st is that this court vacates the status quo orders issued on 19th May, 2021.

I opine that the 1st and 2nd respondents have not satisfied this court, in any way, that the said orders should be vacated. The 1st and 2nd respondents do not deny that the impugned orders are extant. Nor do they dispute the circumstances surrounding their issuance including that the orders were, by consent, accepted by the parties. In the circumstances, prayer 9 in the 1st and 2nd respondents' application is hereby dismissed.

17. The 2nd alternative prayer is that this court refers this dispute to mediation or arbitration by the Intergovernmental Relations Technical committee. I find that this is not a proper case to be referred to the Intergovernmental Relations Technical Committee. In this Petition, the Petitioners are six individuals. The 1st, 2nd, 3rd, 4th, 6th and 7th respondents are either government functionaries or a government agency. The government agency is the National Land Commission.

18. The Intergovernmental Relations Technical Committee handles disputes between County Governments and the Central Government. This dispute is between 6 individuals and named parties. It is not between a County Government and the named government functionaries and one government agency. I, therefore dismiss prayer 9 in the 1st and 2nd Respondent's application.

19. I now revert to prayer 4 in the Petitioners application to the effect;

“That the Honourable Court be pleased to cite the 1st Respondent/The Commandant School of Infantry, Isiolo/Army General/Brigadier in charge of the School of Infantry/Officers and or agents for contempt of court for breaching the status quo order issued by the Honourable Court on 19/5/2021”

20. I find that the 1st and 2nd, 3rd and 6th respondents are aware of the status quo order issued by this court on 19/5/2021. Everyone including the 1st, 2nd, 3rd and 6th respondents must obey court orders. Court orders cannot be issued in vain. They are hereby directed to forthwith obey the status quo orders failing which individuals found culpable will personally be liable to punishment for contempt of court.

21. I do find that the crafting of prayer 4 in the Petitioners application evinces veritable incoacy. In contempt of court matters, those cited must be properly and individually named. Of course, courts cannot jail institutions for contempt of court. It is named individuals who are punished. For this lack of specificity, including names, for those intended to be cited for contempt, I dismiss prayer 4 in the Petitioner's application.

22. In the circumstances, this court issues the following orders;

- a. Prayer 3 in the Petitioners application dated 10th June, 2022 is hereby granted.
- b. Prayer 4 in the Petitioners application dated 10th June, 2022 is hereby dismissed.
- c. Prayers 2, 3, 4, 5, 6, 7, 8, 9 in the 1st and 2nd respondents' application dated 16th November, 2022 are hereby dismissed.



d. Costs for both applications shall be in the cause.

DELIVERED IN OPEN COURT AT ISIOLO THIS 27TH DAY OF NOVEMBER, 2023

In the presence of:

Court assistant: Balozi/Rahma

Caleb Mwititi holding brief for Abubakar for the Petitioners.

Benjamin Kimathi holding brief for Mugira for the 1st and 2nd Respondents.

Benjamin Kimathi for the 3rd and 4th Respondents.

HON. JUSTICE P.M NJOROGE

JUDGE

