



**Ochiago & another v Nairobi County Government & 2 others (Environment and Land
Petition E055 of 2022) [2023] KEELC 22494 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND PETITION E055 OF 2022**

MD MWANGI, J

DECEMBER 20, 2023

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
25, 27, 28,29,31,40, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

LILIAN ANYANGO OCHIAGO 1ST PETITIONER

MARGARET WANJIKI NYAGA 2ND PETITIONER

AND

NAIROBI COUNTY GOVERNMENT 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Background

1. By the Petition dated the 26th November, 2022, the Petitioners herein have approached the court seeking the following reliefs:
 - a. That a permanent Order of injunction/prohibition be and is hereby issued against the Respondents, their servants, agents and /or anybody acting on their behalf from harassing, trespassing, threatening, or evicting the Petitioners and their children from their duty House No. 1 & 2 at Meru-Road (Snr Staff quarters) without due process.
 - b. A declaration do issue declaring that the actions of officers of the 1st Respondent led by City Inspectorate Commander one; Mr. F. Omollo, and the un-identified persons (in the name of Nairobi miraa/Khat Traders) was a



threat to the Petitioners Constitutional Rights contrary to Articles 19, 20, 25, 27, 28, 29, 31, 40, 47 and 51.

- c. A declaration do issue declaring that the actions from officers of the 1st Respondent led by City Inspectorate Commander one; Mr. F. Omollo, in and the un-identified persons (in the name of Nairobi Miraa/Khat traders) has caused the Petitioners and their families' great psychological pain and trauma and suffering contrary to Constitutional Rights under Article 19, 20, 21, 22, 27, 28, 31, 40, 47 and 51.
 - d. That this Honourable Court do make, issue and give such further, other and consequential orders, writs and direction as it may consider appropriate.
 - e. That the costs of this Petition be provided for.
2. The Petition was supported by the sworn affidavit of Lilian Anyango Ochiago, the 1st Petitioner herein with the authority of the 2nd Petitioner. The Petitioners' case is that they are currently employees of Nairobi County Government, the 1st Respondent herein. They are therefore lawfully in occupation of their respective staff duty Houses No. 1 & 2 at Meru-Road (Snr Staff Quarters) having been procedurally allocated the said houses by their employer. They have attached their allocation letters as annexures to the affidavit.
 3. The Petitioners aver that they have paid all monthly rent which is deducted at source by their employer; which deductions reflect on their pay slips as shown on their annexed pay slips for the year 2022. They state that they have never been issued with any notices from their employer or any other persons, terminating the tenancy or notices to vacate from their duty houses.
 4. The Petitioners contend that sometime in November 2022, about 15 Officers of the 1st Respondent led by the City Inspectorate Commander, one Mr. F. Omollo, in the company of about 50 un-identified persons, in the name of Nairobi Miraa/Khat traders stormed their homesteads at Pumwani Hospital and gained forceful entry by breaking down the gates, took several videos and pictures of them, and their Children without their consent.
 5. The Petitioners state that the 1st Respondent's officers verbally threatened, intimidated, humiliated, and physically harassed the Petitioners and their Children and threatened to violently evict the Petitioners and their families, and demolish the Duty Houses No. 1 & 2 at Meru-Road.
 6. The Petitioners further state that the 1st Respondent's officers informed them that the compounds housing the duty houses had been allocated for the construction of miraa/khat market by the Governor of Nairobi City County. The evictions and demolitions were to be done on or before the 1st December, 2022.
 7. The Petitioners state that despite making formal complaints at California Police Station and having been issued with OB Numbers; which they attached as annexures to their supporting affidavit, the 2nd Respondent had not given them security from violent evictions and humiliating actions from the 1st Respondent's officers.
 8. The Petitioners are therefore apprehensive that unless this court intervenes, their constitutional rights will be violated and their children traumatized by the violent, humiliating actions of the 1st Respondent's Officers.



1st Respondent's case

9. The petition is opposed by the 1st Respondent through the replying affidavit of Geoffrey Mosiria, the County Chief Officer, in charge of Health, sworn on 18th May, 2023. The 1st Respondent's case, as can be discerned from the replying affidavit of the above-mentioned County officer, is that the petition is incompetent, misconceived, misguided and fatally defective and should be dismissed with costs to the 1st Respondent.
10. It is contended that the 1st and 2nd Petitioner are currently occupying Duty House No. 1 & 2 at Meru-Road (Snr Staff Quarter) along Meru Road. The Duty Houses are assigned only to staff of Pumwani Hospital. The 1st Respondent states that the 1st Petitioner is no longer working at Pumwani Hospital whereas the 2nd Petitioner was set to retire in August, 2023.
11. Notwithstanding the aforesaid, the deponent contends that the Petitioners have never made any complaint to the Health Wellness and Nutrition Department in relation to any alleged forceful entry, breaking down of their homesteads or any threatened eviction in relation to the said Houses at Pumwani Hospital. Further that no complaint has been lodged at the Housing Department within Nairobi County either.
12. The deponent denies the allegations that 15 officers of the 1st Respondent led by City Inspectorate Commander, in the company of 50 un-identified persons (in the name of Nairobi Miraa/Khat traders) verbally threatened, intimidated, humiliated and physically harassed, the Petitioners and their children. He confirms that no such threats, unlawful or violent threats of evicting the Petitioners and demolition of their Duty Houses has been done by the 1st Respondent or its officers.
13. The deponent further avers that the 1st Respondent is not aware of any allocations of House No.1 & 2 at Meru-Road (Snr Staff Quarter) for the purposes of construction of Miraa/Khat market by the Governor of Nairobi City County. The Petition should therefore be dismissed with costs.

Petitioners' Supplementary Affidavit

14. The Petitioners filed a Supplementary Affidavit sworn by Sarah Wanjiru Karongo, Advocate for the Petitioners, deposed on the 27th June, 2023. The Advocate avers that of all of the 22 Duty Houses at Pumwani Hospital, only House No. 8, 13 and 14 are currently occupied by Staff working at Pumwani Hospital. The deponent avers that the 1st Petitioner occupies Duty Houses at Pumwani Hospital legally after it was officially allocated to her vide the allocation letter.
15. The deponent further alleges that the violation of the Petitioners' constitutional rights was an agenda at the Governor's weekly meeting held on 7th December, 2022 at County Hall. During the said meeting, it is alleged that the Governor admitted, apologized and took responsibility of the inhumane attack on the Petitioners.
16. The deponent avers that the Respondent has not disowned the temporary occupation license (TOL) or the Media Posting by the Governor, when he confirmed the allocation of miraa traders' space in Kamukunji. Further, that the assertions contained in the Replying Affidavit is a serious threat to Article 57 of the Constitution, an abuse to the low integrity of moral checks at County Hall, where Constitutional Protection of Retirees matters not. The Replying Affidavit should therefore be struck out, or leave granted to cross examine the deponent, on facts averred without his knowledge or with intention to mislead the Court.
17. The 2nd and 3rd Respondents entered appearance but did not file any response to the Petition.



18. The Petition was disposed of by way of written submissions.

Petitioners' submissions

19. The Petitioners' identified two issues for determination as follows:

- A. Whether the Petitioners merit the prayers and declarations in the Petition, and
- B. What quantum of damages would be adequate?
- C. Who bears the costs?

20. On the first issue, the Petitioners submit that evictions must be carried out in a civilized manner. The Petitioners rely on the provisions of the Land Act, and the Regulations thereunder. They cite the decision in Mitu-Bell Welfare Society – v- Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018(2021) Eklr, the case of William Musembi 13 Others – v- Moi Educational Centre Co. Ltd & 3 Others (2021) Eklr and Satrose Ayuma & 11 Others – v- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others (2015) Eklr, where Petitioners had sought similar reliefs when faced in similar circumstances. The Petitioners submit that in the cited cases, the courts recognized the constitutional rights of even people often labelled “squatters” to be treated decently.

21. In the instant case, the Petitioners submit that their constitutional rights were infringed, particularly Articles 19, 20, 21,22, 24 and 25 of the Constitution by the actions or inactions of the Respondents. Further Articles 27, 28, 29, 40, 43, 47 and 50 of the Constitution were breached despite there being very clear directions and orders of the court. The Petitioners submit that the Respondents seem to look at the orders granted by the court as a side issue, to the constitutional guarantee of the Petitioners. Compliance has not been adhered to by the Respondents and the Petitioners had endured ‘hell on earth’ since 7th December, 2022 when the orders were granted by this court. Therefore, a declaration of violation of rights alone is not an appropriate remedy and they pray to be granted damages.

22. The Petitioners' submit that the principles applicable to evictions include the duty to give notice in writing; to carry out the eviction in a manner that respects human dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. In this regard, the Petitioners submit that the Respondents have violated Article 28 of the Constitution.

23. The Petitioners argue that there has been a violation of their Constitutional rights and freedoms as made out in their Petition and urge the court to grant the appropriate reliefs since orders of injunctions or even compensation may not be adequate remedies. They also pray for costs of the Petition.

1st Respondent's submissions

24. The 1st Respondent's submissions are dated 4th December, 2023. The 1st Respondent submits that the issue for determination is whether the Petitioners are entitled to the orders sought. The 1st Respondent asserts that the Duty Houses are assigned only to staff at Pumwani Hospital whereas the 2nd Petitioner has also retired from the said Hospital. The Petitioners therefore do not have any rights in respect to the said Houses having retired from the Hospital. A permanent injunction cannot therefore be issued in the circumstances. The 1st Respondent's Counsel cites the case of Kenya Power & Lighting Co. Limited – v- Sheriff Molana Habib (2018) eKLR, to support its position.



25. The 1st Respondent further argues that no proof has been offered of the alleged unlawful violation or threat to violent eviction and demolition of Duty Houses situated at Pumwani Hospital. The 1st Respondent urges the Court to dismiss the Petition with costs.

Issues for determination

26. I have considered the petition together with the response by the 1st Respondent. I have similarly considered the parties' submissions, together with the cited case law. In the court's view, the three issues for determination in this Petition are:
- a. Whether the Petition meets the threshold set out in the *Anarita Karimi Njeru* case;
 - b. Whether the Petitioners have demonstrated violation of their constitutional rights; and
 - c. Whether the Petitioners are entitled to the reliefs set out in the petition against any of the Respondents.

Analysis and determination

A. Whether the petition meets the threshold set out in *Anarita Karimi Njeru's* Case

27. The court in celebrated case of *Anarita Karimi Njeru - v- Republic* 1976-1980 KLR 1272 held that when a petitioner approaches the court for redress of a violation or alleged threat of violation of a constitutional right, he must with precision state the right, the provision of constitution under which that right is provided and the manner in which he alleges that the right to have been violated.
28. In the case *Mumo Matemu - v- Trusted Society for Human Rights Alliance & 5 Others* [2013] eKLR, the court affirmed the position in the *Anarita Karimi Njeru* case and further observed that what is needed is not a formulaic approach to the drafting of the pleadings but that the claim of violation must be discernible from whatever pleadings have been placed before the court. The court stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

29. The court was emphatic on the consequences of a petition failing to meet the threshold. It stated that,
- “We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (*supra*). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the



“epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”

30. The need for precision is not just to allow the Respondents to know the case that they have to answer, but also to enable the court make a clear determination on the alleged violations. This position was stated in the case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* Petition No. 65 of 2010.
31. The petition herein merely refers to ‘alleged contravention of Articles 25, 27, 28, 29, 31, 40, 47 and 50 of the *Constitution*’ on its title but provides no particulars as to the manner of the alleged infringements.
32. An example is in paragraphs 6 and 7 of the petition, where the Petitioners allege that sometime in November 2022, about 15 Officers of the 1st Respondent led by the City Inspectorate Commander, one Mr. F. Omollo, in the company of about 50 un-identified persons stormed the homesteads of the Petitioners at Pumwani Hospital, gained forceful entry by breaking down the gates, took several videos and pictures of the Petitioners, the Children and the Petitioners’ duty houses without their consent. No particulars have been enumerated as to the constitutional right allegedly violated.
33. The Petitioners conclude their narration at paragraph 13 by stating that they are apprehensive that unless this court grants them protection, their constitutional rights will be violated and that their children and family are traumatized by the violent, humiliating actions from officers of the 1st Respondent led by the City Inspectorate Commander one; Mr. F. Omollo in the company of unidentified persons.
34. Stating the provisions of the *Constitution* alleged to have been violated is just part of the task a Petitioner faces. Establishing that the right claimed to be violated or threatened exists and the alleged violation is the next step. It starts with identifying individual articles and linking them with the evidence of actions or inaction on the part of the Respondents which led to the alleged violation of the right. I do not find that to be the case in the instant Petition.
35. The facts of alleged acts of the Respondents are set out in the body of the Petition in a narrative form without any linkage to specific provisions of the *Constitution*. The kind of specificity required of a Petitioner by the holding in Anarita Karimi Njeru case has not been met by the petitioners in the instant petition. This petition is therefore defective. As the Court observed in the Mumo Matemu case this is a substantive shortcoming.
36. Further, the court notes that this Petition does not in fact raise any constitutional issue. I have read and reread the Petition herein. The petition by the Petitioners herein is just an ordinary civil dispute, clothed and framed in the ‘Bill of Rights Language’ to give it a semblance of a Constitutional Petition. It violates the principle of avoidance.
37. In the case of the *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme court of Kenya stated that:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”



38. In *South Africa, in S v. Mblungu*, 1995 (3) SA 867 (CC) before the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

39. Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

40. Mativo J (as he then was) in *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling) held that:

“The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*²⁰ the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.²¹ Currie and de Waal²² opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author’s state: -

“When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

b. Whether the Petitioners have demonstrated violation of their constitutional rights

41. Arising from the above finding by the court, it is quite clear by now that the petitioners have not established and could not hope to establish, in the light of the manner of pleading presented before court, any fact of violation of their constitutional rights. In my humble view, the Petitioners have not laid and/or adduced any credible evidence or at all to prove the claim pertaining to the alleged violation, breach and/or infringement of their constitutional rights and/or fundamental freedoms.



c. Whether the Petitioners are entitled to any of the reliefs set out in the petition against any of the Respondents

42. Having found that the Petitioners have not proved violation of any constitutional rights and or raised any constitutional issue, they would not be entitled to any of the reliefs sought.
43. I wish to comment on one issue in spite of my findings that the Petitioners have not proved their case and are therefore not entitled to any reliefs. I note that the Petitioners have in their submissions sought for an award of damages which prayer was not included in their Petition, on the premises that a declaration of rights alone is not an appropriate remedy.
44. I wish to emphasize that parties are bound by their pleadings. It is unacceptable for a party to change course midstream at the point of submissions without notice to the other party on the premise that what was originally sought is inadequate. Once a party realizes that what is sought in their case is inadequate, they are at liberty to amend their pleadings to give the opposite side an opportunity to respond appropriately.
45. In the case of the *Independent Electoral and Boundaries Commission – v- Stephen Mutinda Mule & 3 others* (2014) eKLR, the court reiterated the principle that parties in litigation are bound by their pleadings. The court in that case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd – v- Nyasulu* (1998) MWSC 3 where the court quoted an article by Sir Jacob entitled, “the present importance of pleadings” published in 1960 where the author had stated that:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or Defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of them might feel aggrieved for a decision given on a claim or Defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any other business” in the same sense that points other than those specific may be raised without notice.”

46. The supreme court of Nigeria on the other hand in the case of *Adetoun Oladeji (NIG) – v- Nigeria Breweries PLC* SC91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”



47. In the case of *Raila Odinga & Another – v- IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that:

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

48. In light of the above findings, the petition herein is dismissed.

49. The court however, considering the circumstances of this case; and the relationship between the Petitioners and the 1st Respondent, directs that each party to bear its own costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Karongo for Kiprop for the Petitioners

Ms. Kerubo h/b for Arati for the 1st Respondent

N/A for the 2nd and 3rd Respondents

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

