



Ouma (Suing on Behalf of the Estate of Wanzala Mugoya) v County Government of Busia & 2 others (Environment & Land Petition 1 of 2018) [2023] KEELC 22289 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND PETITION 1 OF 2018
BN OLAO, J
DECEMBER 19, 2023**

BETWEEN

SIMON OUMA (SUING ON BEHALF OF THE ESTATE OF WANZALA MUGOYA) PETITIONER

AND

COUNTY GOVERNMENT OF BUSIA 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. Simon Ouma (the Petitioner herein) approached this Court suing as the personal representative to the Estate of the late Wanzala Mugoya (the deceased) seeking judgment against the County Government of Busia, the National Land Commission and the Attorney General (the 1st, 2nd and 3rd Respondents Respectively) as follows with regard to the land parcel No Bukhayo/mundika/144 (the suit land):
 - a) A declaration that the Petitioner's rights have been violated and abused.
 - b) An order that the restriction registered on 22nd October 1990 or any other on the land parcel No Bukhayo/mundika/144 be and is hereby lifted.
 - c) An order that the land parcel No Bukhayo/mundika/144 be sub-divided into two being 0.2 Hectares for the Government and 8.0 hectares for the Petitioner and transfer of the same be effected.
 - d) In the alternative to (c) above, an order that the Petitioner be paid Kshs.60,000,000 by the Respondents in compensation.



- e) Any other reliefs that this Court may deem fit.
2. The basis of the Petition which is founded on the repealed Constitution, the 2010 Constitution, the repealed Land Acquisition Act and the Land Act 2012 as well as the facts set out therein and the Petitioner's undated statement as well as that of his witness V. A. Wanzala dated 2nd August 2018 is that at all material times, the deceased was the registered proprietor of the suit land measuring 8.2 hectares and vide a Gazette Notice No 3817 dated 18th August 1989, the Government of Kenya expressed its intention to acquire 0.2 hectares out of the suit land. That vide a Gazette Notice NO 5582 of 1990, the Government of Kenya proceeded to register a restriction on the whole suit land claiming a purchaser's interest by way of compulsory acquisition and proceeded to compulsorily acquire 0.2 hectares of the suit land without prompt and just compensation. The Respondents have therefore restricted the Petitioner's interest and right to use and enjoy the remaining 8.0 hectares. That action is in contravention of the provisions of the Constitution 2010 as well as the Land Act 2012 as the Estate of the deceased are unable to enjoy their rights and interest therein. The portion measuring 8.0 hectares is valued at Kshs.60,000 and the Petitioner seeks the remedies herein.
3. The Petition was supported by the Petitioner's statement and that of his witness V. A. Wanzala dated 2nd August 2018.
4. The Petitioner also filed the following documents in support of his Petition:
- 1) Copy of Grant issued to the Petitioner on 14th March 2017 in Busia Chief Magistrate's Court P&A Cause No 55 of 2016 in respect of the Estate of the deceased.
 - 2) Copy of the deceased's death certificate.
 - 3) Certificate of official search for the land parcel No Bukhayo/mundika/144.
 - 4) Copy of title deed for the land parcel No Bukhayo/mundika/144 issued to the deceased on 29th May 1975.
 - 5) Copies of Gazette Notices no 5582. I notice that although the list of documents dated 2nd August 2018 also refers to the Gazette Notice no 3817, that one was not produced.
 - 6) Copy of the letter dated 17th August 2017 by the Land Registrar Busia County and addressed to the County Surveyor Busia County.
 - 7) Valuation report by Centenary Valuers Ltd dated 11th January 2018 in respect to the suit land.
5. The Petition is opposed by all the Respondents.
6. The 1st Respondent through an answer to Petition dated 4th November 2019 states that the deceased was promptly compensated for the suit land by the National Government in 1989. That the 1st Respondent was not in existence in 1989 and was not therefore part of the acquisition process. In any case, the Petition is statute barred having been filed some 28 years later contrary to the provisions of the Limitation of Action Act. That the acquisition was for purposes of security and the expansion of Marachi and Sofia Estates in Busia town. The Petition should be struck out as it is not supported by any sworn evidence.
7. The 1st Respondent had also filed a Notice of Motion dated 5th December 2022 seeking an order that its name be struck out from the Petition on the grounds, inter alia, that it was not privy to the acquisition of the suit land for security purposes which is a function of the National Government. However on 6th December 2022, I directed that the application could be considered alongside the main Petition.



8. The 2nd Respondent through its Deputy Director Legal Affairs Mr Brian Ikol filed a replying affidavit dated 22nd February 2023 in which is averred, inter alia, that the reason why the suit land remains restricted is because the Petitioner has refused to surrender the original title deed to the suit land for sub-division following the compulsory acquisition. It urged that the Petition be dismissed with costs.
9. Wilfred N. Nyaberi the County Land Registrar Busia swore a replying affidavit dated 23rd February 2023 on behalf of the 3rd Respondent in which he averred that the 2nd Respondent is the one charged with the mandate of compulsory acquisition of land and compensation thereof. That in relation to the suit land, full compensation was paid in accordance with the Constitution and the law. That by the time of the said compensation, the deceased had already sold a portion of the suit land to one Protas Simiyu Indimuli. Similarly, the deceased's wife Akumu Wanjala was compensated in the sum of Kshs.3,680 for 0.2 hectares while the late Protas Simiyu Indimuli's family was compensated in the sum of Kshs.120,232 and Teresa Ouma Namade was compensated in the sum of Kshs.7,820. The acknowledgment slips for those payments are annexed to the affidavit and marked as annexures WN-1A & B, 2A & B, 3 and 4A & B.
10. Therefore the deceased's family was fully compensated for the portion of the suit land which they remained with after selling the other portions to Protas Simiyu Indimuli and giving the other portions to the deceased's sister Teresa Namade Ouma. The restriction on the suit land has been placed thereon in compliance of the law and with the mandate of the Land Registrar Busia. Finally, that the Petitioner has not invoked the process as contemplated by Section 78 of the [Land Registration Act](#) and therefore this Court lacks the jurisdiction to determine it.
11. The following documents are annexed to the said replying affidavit:
 - 1) Affidavit by Veronica Akumu Wanjala dated 21st March 1991.
 - 2) Letter dated 22nd March 1991 from Chief Busia Location.
 - 3) Award dated 15th June 1990 under the *Land Acquisition Act* in respect to the suit land for Kshs.3,680 paid to Veronica Akumu Wanjala.
 - 4) Acknowledgment slip dated 22nd March 1991 by Veronica Akumu Wanjala for receipt of Kshs.3,680.
 - 5) Award dated 15th June 1990 for Kshs.120,232.50 under the *Land Acquisition Act* for the suit land paid to A.P.S. Indimuli.
 - 6) Award dated 15th June 1990 for Kshs.7,820 paid to Teresa Namada Ouma for the suit land.
 - 7) Acknowledgment slip dated 14th March 1991 signed by Teresa Namada Ouma for Kshs.7,820.
12. The Petition has been canvassed by way of written submissions. These have been filed by Mr Fwaya instructed by the firm of Gabriel Fwaya & Company Advocates for the Petitioner and by Mr Juma Collins Senior State counsel for the 3rd Respondent. The 1st and 2nd Respondents did not file any submissions as none are on the file.
13. I have considered the Petition, the replying affidavits, the annexures and the submissions by counsel.
14. Before I consider the merits or otherwise of the Petition, I will first address an issue of this Court's jurisdiction to determine it. This is because an issue of jurisdiction must always be the first point of call by any Court the moment it is raised – [Owners Of The Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd](#) CA Civil appeal no. 50 of 1989 [1989 eKLR] where it was held that "a Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



15. In urging this Court to down it's tools in this matter, Mr Wilfren N. Nyaberi the County Land Registrar Busia has averred in paragraph 17 of his replying affidavit dated 23rd February 2023 as follows:
17:

“That it is well within my knowledge that the Petitioners had not invoked the process as contemplated by the provisions of Section 78 of the *Land Registration Act* and I am advised by my advocates that this Honourable Court therefor lacks the jurisdiction to hear, determine and maintain this Petition.”

Section 78 (1) and (2) of the *Land Registration Act* provides that:

(1)

“The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.”

(2)

“Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”

16. While it is true that the Land Registrar, pursuant to the above provision, has the power to remove a restriction placed on land, that is not the sole prerogative of the Land Registrar. A reading of Section 73(1) of the same *Act* makes it clear that this Court enjoys the same powers. It reads:

(1)

“A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.”

It is clear therefore that orders for removal of restrictions, cautions or any inhibitions on land are not the preserve of the Land Registrar. This Court enjoys similar powers.

17. Most importantly, it is clear from paragraph 26 of the Petition herein that other than the lifting of the restriction on the suit land, Petitioner also sought other remedies being:

- a) A declaration that his rights have been violated.
- b) –
- c) An order that the suit land be sub-divided into two i.e. 0.2 hectares for the Government and 8.0 hectares for the Petitioner and transfers be effected.
- d) In the alternative to (c) above, an order that the Petitioner be paid Kshs.60,000,000 by the Respondents in compensation for the suit land.

The above remedies are well within the jurisdiction of this Court as set out in Section 13(2) of the *Environment and Land Court Act* 2011 and Section 150 of the *Land Act* 2012.

18. The objection as to this Court's jurisdiction is not well taken. It is for dismissal.

19. I shall now consider the merits or otherwise of the Petition.



20. There is no doubt in my mind that the Petition as drawn meets the threshold as set out in the case of *Anarita Karimi Njeru -v- R* 1979 eKLR. The constitutional provisions as well as the other relevant laws alleged to have been violated have been clearly set out. Indeed I did not hear the Respondents claim otherwise.
21. In determining the merits of this Petition, this Court must also consider whether the claim is defeated by the delay in filing it. The violations complained of took place between 1989 and 1990. That is clear from paragraphs 16, 17 and 18 of the Petition where it is pleaded thus:

16:

“That vide gazettment Notice 3817 dated 18/8/1989, Government of Kenya notice of intention to acquire 0.2 ha from 8.2 ha of land parcel LR No. Bukhayo/mundika/144 opening and inquiry.”

17:

“That the inquiry having been completed, the Government vide gazettment Notice 5582 of 1990 published it’s intention to acquire the 0.2ha portion of land parcel thereafter proceeded to register a restriction against the whole parcel of land measuring approximately 8.2 ha claiming purchaser’s interest by way of compulsory acquisition.”

18:

“The Respondents proceeded to compulsory acquire the 0.2 ha of the Petitioners aforesaid parcel of land without prompt just compensation of the same.”

If time is compiled from 1990, it means that the Petitioner who moved to this Court on 8th August 2018 delayed for 28 years before filing this Petition. That delay is quite inordinate by any standards. This has prompted the 1st Respondent to plead in paragraph 3 of its answer to Petition thus:

3:

“That the Petitioner’s claim for payment is statutorily time barred by the *Limitation of Actions Act* and the relevant laws and is incompetent and offends provisions of Order 37 of the *Civil Procedure Rules* for seeking removal of a restriction through a constitutional Petition”.

In his submissions on that issue, counsel for the Petitioner has stated thus:

“The Petitioner herein is not claiming for any land. He is basically saying that a portion of 8.0 ha which has not been acquired by the Government has been restricted. His use and enjoyment thereof is also restricted contrary to express provisions of the Constitution including Article 40. In the premises, he seeks for a declaration of such violation of his rights under the Constitution. Section 7 of the *Limitation of Actions Act* and Section 3 of the *Public Authorities Limitations Act* relied upon by the Respondents are not applicable.”

It is now well settled that neither the *Limitation of Actions Act* nor the Constitution debars a party from seeking a remedy alleging violations of fundamental rights. In the case of *Chief Land Registrar*



Ɖ Others v Nathan Tirop Koech Ɖ Others C.A. Civil Appeal no 51 of 2016 [2018 eKLR], the Court of Appeal addressed that issue as follows in paragraph 61 thereof:

61:

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional Petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Action Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the state or any person from claims of enforcement of fundamental rights and freedoms protected under the Bills of Rights.”

The Court proceeded to say the following in paragraph 65:

65:

“In our consideration of laches, we observe Article 259 (8) of the *Constitution* stipulates that if a particular time is not prescribed for performing a required act, the act should be done without unreasonable delay.”

The above case was approved in *Safepak Limited v Henry Wambega Ɖ 10 Others* C.A. Civil Appeal No 8 of 2019 [2019 eKLR] where the Court said at paragraph 38 thus:

38:

“Whether a constitutional Petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such consideration as the length of delay; explanation for such delay; availability of witnesses; and consideration as to whether justice will be done.”

My understanding of the above precedents and others, is that whereas there is no time limit in filing constitutional Petitions, the length of delay and explanation thereof are no doubt matters which the Court must consider. In this case, the delay of 28 years in filing this Petition is no doubt inordinate. Most importantly, it has not been explained at all. That, in my view, militates against granting the remedies sought in this Petition.

22. In the case of *Chief Land Registrar Ɖ Others v Nathan Tirop Koech* (supra), the Court also made the following observation at paragraph 60:

60:

“We are alive to the decision of this Court in *Paterl N. Kariuki v Attorney General* [2014] eKLR Civil Appeal No 79 of 2012 where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in *Kamlesh Mansuklala Damji Pattni Ɖ Another v Republic* [2013] eKLR where it was noted that the Constitution did not set a time limit within which application for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts



himself regarding those proceedings may have his claims denied as an abuse of the Court process.” Emphasis mine.

All that was required of the Petitioner in this case, knowing that the suit land was compulsorily acquired in 1990, was to give a reasonable explanation as to why this Petition was not filed earlier. This is not among those cases where Petitioners were hampered in pursuing their rights due to restricted democratic space prior to the promulgation of the 2010 as has been the explanation in many cases. If this Petition were to be determined solely on the ground of delay which is unreasonable and unexplained, the odds would weight heavily against the Petitioner.

23. This Petition will however be determined on whether infact the Petitioner still has any interest in the suit land. The 3rd Respondent has by the replying affidavit of the Land Registrar dated 23rd February 2023 availed documentary evidence showing that infact the deceased’s wife Veronica Akumu Wanjala had already sold part of the suit land to one Protas Simiyu Indimuli in 1987 for a consideration of Kshs.15,000. That is clear from her own affidavit dated 21st March 1991. Part of the land has also already been acquired by Teresa Namada Ouma. Then there are copies of awards issued vide the then Land Acquisition Act (now repealed) showing that both Veronica Akumu Wanjala, Protas Simiyu Indimuli and Teresa Namada Ouma were compensated for the suit land in the sum of Kshs.3,680, Kshs120,232.50 and Kshs.7,820 respectively. Paragraphs (b) of those awards all read as follows:

b)

“The area of the land to be acquired is 8.2ha.”

The Petitioner did not question the authenticity of those various awards duly executed by the Commission of Lands under the repealed Land Acquisition Act. It is clear from those awards that not only was the Petitioner’s wife veronica akumu Wanjala compensated for the suit land way back in 1990 but so too were the other purchasers of portions of the same. The totality of those awards is that infact the Government of Kenya not only compulsorily acquired the whole 8.2 hectares comprised in the land parcel no Bukhayo/mundika/144 as indicated therein but also fully paid for the same. Section 75(1) of the retired *Constitution* provided in part that:

1.

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied;

- a) -
- b) -
- (c) provision is made by a law applicable to that taking of possession of acquisition for the prompt payment of full compensation.”

Section 8 of the repealed *Land Acquisition Act* provided that:

“Where land is acquired compulsorily under this part, full compensation shall be promptly paid to all persons interested in the land.”

Section 6 of the same Act empowered the Minister responsible to initiate the compulsory acquisition of land for, among other needs, interests of justice, public safety, public under or morality as well as town and county planning. Sections 107 to 133 of the *Land Act* 2012



provides for the compulsory acquisition of land and Section 115 specifically provides for prompt payment of compensation. Article 40 of the 2010 Constitution protects the right to land. The various awards herein clearly show that the suit land was acquired:

“ For Rehabilitation Of Sofia And Marachi Estate In Busia Town Gazette Notice No 5582 Dated 21st December 1988 And 3817 Dated 18th August 1989.”

It is clear to this Court that not only was the suit land compulsorily acquired and prompt payment made both to the Petitioner’s wife and other beneficiaries to whom she had sold portions thereof but further, the said compulsory acquisition was in respect of a public need as set out in the relevant laws. While it is not in dispute that the deceased was the registered proprietor of the suit land holding the title thereto since 29th May 1975, it is now also clear from cogent evidence that his wife relinquished ownership of part of that property and sold it to others and subsequently, they were all fully compensated for the whole 8.2 hectares comprised in the title no Bukhayo/mundika/144. This Petition is entirely without merit and must be dismissed as there is no violation of any rights as known in law.

24. With regards to costs, this is not by any means a public interest litigation. If anything, it is a clear attempt at unjust enrichment. The Respondents are therefore entitled to costs as provided for under Section 27 of the *Civil Procedure Act*.
25. The up-shot of all the above is that having considered all the evidence in this Petition, this Court makes the following disposal orders:
 - 1) The Petition is dismissed.
 - 2) The Petitioner shall meet the Respondents’ costs.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF DECEMBER 2023 BY WAY OF ELECTRONIC MAIL.

RIGHT OF APPEAL

BOAZ N. OLAO

JUDGE

