



REPUBLIC OF KENYA



Konde & 349 others v Cabinet Secretary Ministry of Lands & 15 others (Environment & Land Petition E026 of 2022) [2023] KEELC 22296 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22296 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION E026 OF 2022

SM KIBUNJA, J

DECEMBER 13, 2023

**IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21, 23, 24, 40, 60, 63,
67, 68, 159, 162, 165, AND 259 OF THE CONSTITUTION OF KENYA,
2010.**

AND

**IN THE MATTER OF SECTION 3, 4 AND 5 OF THE LAND ACT
AND IN THE MATTER OF SECTION 3, 4, 5 AND 6 OF THE NATIONAL
LAND COMMISSION ACT**

BETWEEN

LENON KONDE & 349 OTHERS PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF LANDS 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

DIRECTOR LAND ADJUDICATION 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

ERICO NGARI 6TH RESPONDENT

RASHID BEDZIMBA 7TH RESPONDENT

RABIA BANITA 8TH RESPONDENT

BENJAMIN MULI 9TH RESPONDENT

GEOFREY MWAKAI 10TH RESPONDENT



KAHINDI THOYA BAYA	11 TH RESPONDENT
ENOCK OLANDO ATSULE	12 TH RESPONDENT
SALIM AMIR MUDZOMBA	13 TH RESPONDENT
BAKARI HAMISI	14 TH RESPONDENT
MWANGEMI THOMAS	15 TH RESPONDENT
DANIEL KOPA	16 TH RESPONDENT

JUDGMENT

1. Petitioners commenced this proceeding through the petition dated the 30th June 2022 as amended on the 7th October 2022 seeking for the following reliefs:
 - a. Declaration that the respondents have violated the petitioners' rights under Articles 23, 40 and 60 of the Constitution.
 - b. Declaration that the entire process of adjudication were erroneous, illegal, fraudulent and wrongful and a violation of the Constitution, Land Act and National Land Commission Act and any title deed emanating from such process is null and void *ab initio*.
 - c. Order of permanent injunction restraining the respondents by themselves, servants, agents, employees and or any other person acting on their behalf and instructions from selling, disposing off, transferring, developing and or evicting the petitioners therefrom and from dealing the parcel of land comprising of Mwakirunge Settlement Scheme 11 in any manner whatsoever.
 - d. Cost of the petition.

2. The petitioners aver that the Mwakirunge Settlement Scheme, hereinafter referred to as the scheme, was initiated in 2008 to settle the squatters who were occupying the land without ownership documents. That the Committee was constituted to identify each person and the portion of land they occupied on the land. That upon completion of the exercise, they were issued with letters of allotment in 2010. That when the 1st to 3rd respondents started issuing title deeds in 2015, the petitioners realized that land had been allocated to other people who were not among the intended beneficiaries. The petitioners protested and though a committee was formed to look into the matter, it was later disbanded without ensuring that only the intended beneficiaries were allocated land. The 1st to the 5th respondent promised the petitioners that the allocation would be rectified and each of them would be allocated land but in 2022, the 6th to 12th respondents started to come to take possession of the lands allocated to them and threatening to evict the squatters in occupation. The petitioners, who were the original residents of Mwakirunge Settlement Scheme, found out that though they were not considered for allocation of land, the 6th, 7th, 8th, 9th, 14th, who were the Regional Police Commander, Kisauni Constituency Member of Parliament, Area Chief, the Surveyor in charge of the Scheme, Mombasa County Women Representative respectively, and other people of influence who were not residents in the scheme were fraudulently and wrongly allocated land that was meant for the original residents. That the 6th to 12th respondents were, as civil servants, entrusted by the 1st to 5th respondents to carry out the adjudication in the scheme for the benefits of the petitioners but instead allocated the land to themselves. That there were blatant irregularities, lack of transparency and accountability in the entire



process of land allocation at the scheme leading to their being discriminated and their constitutional rights to land being arbitrary taken away

3. Enock Olando Atsulu, sued as Enock Olando Atsule, the 12th respondent, opposed the petition through the reply to the petition dated the 22nd November 2022. He denied being a first instance beneficiary of land from the scheme, or inappropriately benefiting due to his public position. He annexed copies of the title deeds and sale agreements in respect of Mombasa/Mwakirunge 11 Scheme/445 and Kisauni/Mwakirunge 11 Scheme/446 that he stated he bought from the original allottees for value.
4. Ngare Riko Ngare, the 6th respondent opposed the petition through his reply dated the 26th November 2022. He denied benefitting from any allocation of land from the scheme by virtue of his office. He admitted having a beneficial interest over Kisauni/Mwakirunge 11 Scheme/669 initially allocated to Dala Malau who later passed on. That the deceased brother, one Chumbe Malau Jindwa, allowed Abubakar Rajab Iddi to take possession awaiting the succession process. That in turn the said Abubakar placed him in possession awaiting the succession process and eventual transfer in his favour. That though the succession process has not been done, the petitioners should not be concerned with his presence on the plot as he has the blessings of the deceased's family. That he had also purchased Kisauni/Mwakirunge 11 Scheme/270 that he bought from Abubakar Rajab Iddi who had reportedly purchased it from the initial allottee. That he has not used his position in the National Police Service to intimidate the petitioners as the two plots are fenced off. He annexed copies of the title deed of the two properties.
5. Mwangemi Thomas, the 16th respondent, also opposed the petition through his reply dated the 23rd November 2022. He stated that he resides in the scheme but denied having been an allottee of any parcel therein. He added that his father was one of the original residents of the scheme and was allocated Kisauni/Mwakirunge Scheme 11/721 where he resides. That he was born in 1990 and was therefore in school when the demarcation in the scheme was being done.
6. Daniel Kopa, the 17th respondent, opposed the petition through his reply dated the 22nd November 2022. He stated that the Government of Kenya acquired 1000 acres from Edward Musamuli's 1498 acres and established the Mwakirunge Settlement Scheme 11 in 2007. That he was appointed the chairman of the Settlement Committee that embarked in the process of picking the people occupying the 1498 acres, and place them within the 1000 acres acquired between 2008 and 2009. They agreed to reserve 20% of the land for public utilities, 60% for the indigenous people on the ground and 20% for other members of the public, and on completion of the exercise, letters of allotments were issued in 2012. He stated the following about the petitioners:
 - a. That 89 of the petitioners were beneficiaries in the Scheme.
 - b. That 149 petitioners were minors in 2008 and hence not eligible for allotment.
 - c. That the 3rd petitioner was in jail at the time of allocation, and therefore not a resident in the scheme. That he has been living with his father Panga Mkengache who was one of the allottee's who later sold his plot.
 - d. That the rests were not residents in the scheme and could not have been considered.

He annexed a list of the petitioners who were among those allocated land in the scheme, those that were minors at the time of allocation, and those that came to the scheme after the allocation. He termed the petition as misconceived and mischievous and sought for it to be dismissed with costs.



7. Rashid Juma Bedzimba, the 7th respondent opposed the petition through his reply dated the 21st November 2022 inter alia denying that he benefited himself by virtual of being a member of parliament; that he became a member of parliament in 2013 after the beneficiaries in the scheme had been identified; that he was not among the allottees and does not own land in the scheme; that the only land he visit belongs to Abdillahi Rashid Juma who bought it from Ramos Mbwana Mwangari, the original allottee.
8. Sammy A. Mchomba, the County Land Adjudication and Settlement Office Mombasa opposed the petition through his replying affidavit sworn on the 10th March 2023 in which he among others deposed that 1000 acres land, Mwakirunge Settlement Scheme 11, was bought by the Governmentt from Edward Lenjo Musamuli to settle the squatters who had invaded his 1488 acres land; the local land committee, whose membership he named at paragraph 6 of the affidavit, was formed on the 28th November 2007 and did the squatter identification; that the scheme was planned with plot sizes of approximately 3/4 of an acre and 22 public utilities such as roads, schools and health centres provided for; that though the allottees had been asked not to sell the allocated plots, some people bought up to ten acres from the squatters; that other people started cultivating portions hoping they would benefit but did not; others were underage and could not benefit; that the petitioners claim has not met the threshold in *Anarita Karimi Njeru v Republic* [1979] KLR 154 and should be dismissed with costs.
9. On record is a replying affidavit by Bakari Khamisi, the 15th respondent in response to the notice of motion dated 30th June 2022 as confirmed by paragraph 3 thereof. It is therefore not a response to the petition.
10. Directions were issued on the 9th February 2023, 23rd March 2023, 3rd July 2023 and 21st September 2023 on filing and exchanging submissions on the petition. The leaned counsel filed the submissions as detailed herein under:
 - a. The petitioners' submissions dated the 22nd June 2023 seeking for the grant of the orders in their application dated 30th June 2022.
 - b. The 1st to 5th respondents' submissions dated the 3rd August 2023 in opposition to the application dated the 30th June 2022.
 - c. The 6th, 7th, 11th, 12th, 16th, and 17th, respondents' submissions dated the 26th September 2023 on the petition and seeking for it to be dismissed with costs.
 - d. The 15th respondent's submissions dated the 20th September 2023 on the application dated the 30th June 2022.

The court has considered the said submissions in as far as they touched on the issues for determination in the petition.

11. The following are the issues for the determination by the court in the petition:
 - a. Whether the petitioners have established that the entire process of adjudication and plot allocation at the scheme was erroneously, illegally, fraudulently and wrongfully done and in contravention of the *Constitution*, *Land Act* and *National Land Commission Act*.
 - b. Whether the petitioners have shown with precision and clarity how their alleged constitutional rights and freedoms have been infringed as required in *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272.
 - c. Whether the petitioners are entitled to any of the prayers sought.



- d. Who pays the costs?
12. The court has carefully considered the grounds on the petition, the reliefs sought thereon, replies to the petition filed by the various respondents as summarized herein above, submissions filed and come to the following findings:
- a. In support of the petitioners' petition is the affidavit in support of both the notice of motion and petition of Lennox Kombe, the 1st petitioner, sworn on the 30th June 2022 that was filed with the initial petition and application of even dates. He inter alia deposed that after the picking and or setting apart exercise, the petitioners were issued with letters of allotments. However, majority of them were later left out, and or their parcels were subdivided and allocated to strangers and public officers, leaving those petitioners landless and others displaced. That they raised their complaints with the lands office through memorandum dated the 13th February 2015, but when they were waiting for their grievances to be addressed, the Ministry of Lands through the Land Adjudication and Land Registrar's office started issuing title deeds to the new entrants who started displacing, dispossessing and evicting the original residents from their lands. That the petitioners lodged complaints with the National Land Commission dated 20th September 2021 that has not elicited any response. They then filed this petition.
- b. The 12th, 6th, 16th, 17th, and 7th respondents' response to the petitioners' allegation is as summarized at paragraphs 3 to 7 above respectively. They have denied being direct allottees in the scheme, and also any wrongdoing, fraud or abuse of their public office in acquiring of the plots associated with them thereof. The 12th respondent annexed copies of sale agreements over parcels 445 and 446 confirming he bought them from those he termed original allottees. The 6th respondent admitted purchasing plot 270 from Abubakar who had bought it from an allottee, and also indicated he has an interest over plot 669, which was initially allocated to a person who has passed on. The 16th respondent denied being a beneficiary to any of the plots in the scheme, but disclosed that he lives with his father on a plot his father was allocated in the scheme. The 17th respondent was the chairman of the Mwakirunge 11 Settlement Scheme Committee and gave details including annexing documents to show those of the petitioners who were among the beneficiaries and those who were not beneficiaries and the reasons thereof as follows;
- i. That 89 of the petitioners were beneficiaries in the Scheme.
- ii. That 149 petitioners were minors in 2008 and hence not eligible for allotment.
- iii. That the 3rd petitioner was in jail at the time of allocation, and therefore not a resident in the scheme. That he has been living with his father Panga Mkengache who was one of the allottee's who later sold his plot.
- iv. That the rests were not residents in the scheme and could not have been considered.
- The foregoing explanations by the respondents on the allegations raised against them have not been challenged or rebutted by the petitioners through any evidence to the contrary.
- c. The 1st to the 5th respondents have opposed the petition through the affidavit of Sammy A. Mchomba, the County Land Adjudication and Settlement Office Mombasa, sworn on the 10th March 2023. He detailed how 1000 acres land, was bought by the Governmentt from Edward Lenjo Musamuli to settle the squatters who had invaded his 1488 acres land that Mwakirunge Settlement Scheme 11 was establish on that land and the Local Land Committee,



whose membership he listed at paragraph 6 of the affidavit, was formed on the 28th November 2007. The committee did the squatter identification, spearheaded the planning of plot sizes of approximately 3/4 of an acre each and 22 public utilities such as roads, schools and health centres. That though the allottees had been asked not to sell the allocated plots, some people bought plots up to ten acres from the squatters. That other people started cultivating portions hoping they would benefit but did not, while others were underage and could not benefit. The explanation given by Mchomba mirrors that of the 17th respondent and again it remains unrebutted by the petitioners.

- d. The reliefs sought by the petitioners are for declaration that the respondents have violated the petitioners' rights under Articles 23, 40 and 60 of the Constitution; declaration that the entire process of adjudication were erroneous, illegal, fraudulent and wrongful and a violation of the Constitution, Land Act and National Land Commission Act and any title deed emanating from such process is null and void *ab initio*; order of permanent injunction restraining the respondents by themselves, servants, agents, employees and or any other person acting on their behalf and instructions from selling, disposing off, transferring, developing and or evicting the petitioners therefrom, and from dealing the parcel of land comprising of Mwakirunge Settlement Scheme 11 in any manner whatsoever, and cost of the petition. In considering this petition, it is important to understand what the petitioners stand for or are seeking. In my view, it is not clear whether the petitioners' complaints relate to all the allocations in the entire Mwakirunge Settlement 11 Scheme or the is limited to the parcels of land they believed had been allocated to the respondents herein in the scheme. If the interests of the petitioners is to have all the allocations in the said scheme nullified, then they should have ensured that all the beneficiaries were either joined as parties or notified of the petition through appropriate advertisement of the proceeding so that they could elect to apply to join. I say so because going by the list headed "Mwakirunge Phase 11 Settlement Scheme Beneficiaries" attached to the replying affidavit of Sammy A. Mchomba representing the 1st to 5th respondents, 950 people were allocated plots in the scheme. The petitioners are only 350 people out of whom 89 are among the beneficiaries. If you minus 89 people from 950, it would mean 861 people, who are among the beneficiaries, were either satisfied with the allocation or are unaware of this petition or do not wish to participate in the petition. The court cannot assume that the 861 are aware of the petition or supports the petition without the petitioners presenting such evidence to the court. Those 861 have a constitutional right to be heard before orders likely to interfere with their rights to the properties allocated to them in the scheme can be considered.
 - e. The petitioners have the legal duty to tender proof in support of the alleged infringements of their constitutional rights. With the explanation by the 17th respondent that 149 of the petitioners were minors at the time of the allocation, 3rd petitioner was in jail and about 111 others coming to the land after the identification of the squatters on the land had been completed remaining unchallenged, leads the court to find that the petitioners have totally failed to prove their claim against all the respondents.
 - f. That appreciating that the petitioners were only trying their luck to be considered for allocation of some land, the court is of the view that justice will be served by an order that each party bears their own costs.
13. In view of the foregoing conclusions, the court finds and orders as follows:
- a. The petition is without merit and is hereby dismissed.
 - b. That each party to bear their own costs.



Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 13TH DAY OF DECEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioners : Mr. Mkan.

Respondents: Mr. Mwkisha for 6th, 7th, 11th, 12th, 14th, 16th and 17th Respondents.

Mr. Mathare for Bunde for 15th Respondent.

