



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.178 OF 2014

PAUL WAWERU & 28 OTHERS.....PETITIONER

-VERSUS -

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. This petition relates to a claim by the petitioners that they were not resettled or compensated when they were required to move from a parcel of land situated in Kileleshwa, Westlands, Nairobi, to pave way for the construction of link roads in the area
2. They allege that they were carrying out various businesses on an undeveloped parcel of land in the area and had hoped to be registered as owners of the land as lessees by the government. They were however required to vacate during the construction of the roads. Their claim is that they did not receive any form of compensation even though they were persons who were affected by the road construction project. They therefore ask the Court to find in their favour and grant them the orders set out in their petition dated 17th April 2014 as follows:
 - i. *The respondents be compelled to resettle the petitioners.*
 - ii. *The respondents be compelled to compensate the petitioners the quantum of such compensation be assessed by this Honourable Court.*
 - iii. *The respondents be compelled to pay the costs of this petition.*

The Petitioners' Case

3. The facts of the case as related by the petitioners are set out in the affidavit of Mr. Paul Waweru sworn on 17th April 2015. The petitioners state that they were in occupation of an undeveloped parcel of land in Westlands/Kileleshwa for a period of over 8 years as *jua kali* artisans. They had hoped to seek the government's help to be registered as owners even if as lessees for a term.

4. Around 2010, they were approached by the 1st respondents and requested to vacate the land as it was a road reserve, which was described by the 1st respondent as the “**MISSING LINKS NOS 3, 6, AND 7 – NORTH WESTERN RING ROAD**”. Following various meetings with the respondents, they were informed by letter dated 9th April 2014 that they would be relocated to another site where they could continue with their income generating activities. They were also promised that their skills would be improved, but this was not done, nor were they resettled as had been promised.
5. The petitioners state that they have made several trips to the respondent’s offices to find out when the promises would be met, to no avail. They have also unsuccessfully sought to engage the respondents through their advocates on record. They further allege that they have been physically pushed out of the land by the 2nd respondent, and they have also been ruthlessly removed from any place on which they have tried to settle, and their properties confiscated. It is their contention that they have no other source of income, and all their rights under the Constitution have been flouted. They therefore ask the Court to intervene and compel the respondents to resettle and compensate them.
6. In his submissions on behalf of the petitioners, Mr. Khamati argued that the substance of the petition is that the petitioners have been unfairly treated in a matter touching on their livelihood. He noted that the respondents had admitted that there was construction of link roads 3 and 7 going on, and that the petitioners were on link road 7. They were Project Affected Persons (PAPs) who did not have title deeds, and their presence had been duly acknowledged by the respondents.
7. It was his submission that the petitioners were left out for no apparent reason, and having been forcibly removed without compensation or resettlement, they have a justifiable claim, and are entitled to compensation.

The Respondents’ Case

8. The respondents filed an affidavit in opposition to the petition sworn by Eng. Erastus Kiprotich Chepkwony on 27th May 2014. Eng. Chepkwony states that he is an engineer at the Design and Construction Department of the 1st respondent with personal knowledge of the facts forming the basis of this petition.
9. According to the respondents, sometime in 2008, the government of Kenya, with support from the government of Japan through the Japan International Cooperation Agency (JICA) agreed to construct Nairobi missing links numbers 3,6 and 7. JICA commissioned a basic and detailed design study for the project, whilst the then City Council of Nairobi carried out the socio-economic study and developed a prototype for a resettlement Action Plan(RAP). A census of Project Affected Persons (PAPs) was also done, and the properties to be affected by the properties also identified.
10. Eng. Chepkwony deposes that the census of the PAPs, who were temporary occupiers of the properties identified, was a time bound exercise in which all PAPs *in situ* were captured as at an appointed cut- off date of 23rd June 2009. He states that those who came onto the road reserve thereafter with the hope of benefiting from the process were not considered for resettlement as they were effectively outside the scope of the RAP. Those PAPs who had genuine titles were processed in terms of the Land Acquisition Act (now repealed).
11. It is the respondents’ case that the contents of the RAP were discussed and agreed with the PAPs whose representatives attended and participated in the signing ceremony on 9th October, 2009 in the office of the City Engineer, City Council of Nairobi. Measures were also put in place, which the respondents enumerate, to ensure that the PAPS had ample time to relocate and that rush and unplanned relocation processes epitomized by forcible demolitions and displacements were avoided. It is also their averment that the relocation was carried out systematically, with the PAPs’

businesses quantified and compensated in accordance with the entitlement matrix in the RAP; that they were provided with transport to new sites and security during the relocation process, and compensation paid to those with titles.

12. With respect to those PAPs who had garages, the respondents aver that the 1st respondent leased an acre of land for them for a year to allow them to restore their incomes and pay for themselves in the succeeding years. Mr Chepkwony avers that the PAPs associated with auto garages also joined an existing cooperative society known as Kilimani Jua Kali Sacco Society Ltd and identified a suitable piece of land to which the 1st respondent paid rent for a year amounting to Ksh1.8million.
13. With respect to the skills training, it is the 1st respondent's averment that this did not materialise as the PAPs had no interest and were only interested in relocation, resettlement and income restoration.
14. The respondents state that thereafter the contractor for the project took possession, the western ring roads were constructed, and they were inaugurated by former President Mwai Kibaki on 10th December 2013. It is its case therefore that the present petition and the prayer for resettlement is frivolous, misplaced and without merit. The 1st respondent terms the petition as intended to implement the RAP, and views the petitioners as indolent as the provisions of the RAP have already been implemented as detailed in the affidavit of Eng. Chepkwony.
15. In his submissions on behalf of the respondents, Mr. Obura submitted that all the PAPs were compensated, whether they had title to the properties they occupied or not. He observed in particular that the 1st petitioner, Mr. Paul Waweru, was included in the list of PAPs annexed to the affidavit of Eng. Chepkwony, his name being no. 19 on the list. Mr. Obura also drew attention to the agreement between the PAPs who owned garages on road reserves with the 1st respondent in which they indicate that they were resettled peacefully and alternative spaces paid for by the 1st respondent.

Determination

16. Having read and considered the pleadings and submissions of the parties in this matter, I believe only one issue arises in this matter: whether there has been a violation of any of the petitioners' rights under the Constitution as alleged or at all.
17. As is now settled, a party alleging violation of constitutional rights has an obligation to demonstrate, with a reasonable degree of precision, the provisions of the Constitution violated with respect to him, and the manner of such violation – see *Anarita Karimi Njeru and Trusted Society of Human Rights*. In this case, it is noteworthy that while the petitioners have cited in the title to their petition Articles 22, 40, 43, 47 and 56 of the Constitution, there has been little attempt made to demonstrate how their rights under these provisions have been violated. The petitioners make a general statement in their petition that their rights under Chapter Four of the Constitution, which is the chapter that contains the Bill of Rights, were violated, but no demonstration of violation has, in my view, been made out.
18. To illustrate, first, with respect to Article 22. This Article contains the guarantee to everyone of the right to bring a petition before the Court alleging violation of any of their rights under the Constitution. The petitioners have done this, with no hindrance.
19. The petitioners also allege violation of Article 40 of the Constitution. Article 40 contains the constitutional guarantee with respect to property in the following terms:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

20. The petitioners' claim is premised on their having occupied the land in question for a period of eight years or so, and their having hoped to be registered as owners as lessees by the government. They do not dispute that the land they were in occupation of was a road reserve, public land, set aside for the benefit of the public in general. They were required to move from the land in order to make way for the construction of link roads, which was done. No attempt has been made to show how the petitioners have a right to the road reserve that would be protected under Article 40.

21. The petitioners also allege a violation of their rights under Article 43. The basis of their claim in this regard is that they were carrying on their businesses on the road reserve, and their removal was therefore in violation of their right to a livelihood. Article 43 guarantees the right to socio-economic rights in the following terms:

43. (1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

22. The petitioners claim that they were pushed from the land they occupied and from which they earned a living, and every time they tried to settle elsewhere, they were ruthlessly removed and their properties confiscated. They have referred in this regard to letters which they state are annexed to the affidavit of Mr. Waweru as annexure 'C'. However, there are no such letters in the said affidavit, and nothing is placed before me to support their claim of violent removal or confiscation of property.

23. What the Court finds is that the petitioners' own documents bear out the respondents' contention that the petitioners were part of the PAPs included in the resettlement action plan (RAP) under which project affected persons were to be assisted to move, and given alternative sites for their businesses. Further, save for the assertion that the deponent of the respondent's replying affidavit, Mr. Chepkwony, was not involved in the project, his averments with regard to the actions taken by the respondents for the implementation of the RAP have not been controverted. In the letter dated 9th April 2010 annexed to Mr. Waweru's affidavit as annexure 'B', Mr. Waweru, who is PAP number 19 in "**Appendix 2: PAPs Socio-Economic Data**", is informed that relocation sites are ready, and that the PAPs are required to vacate the land in twentyone days.

24. According to Mr. Chepkwony, relocation sites for garages had been identified, and rent paid for a year. The material before me does not therefore bear out the petitioners' contention that they were violently evicted and their properties destroyed, nor is there anything to show that they attempted to move to other locations from which they were again forced to move. I cannot therefore find a violation of the petitioners' rights under Article 43 with respect to their right to a livelihood, which the Court recognises is closely inter-linked with the rights guaranteed under Article 43.

25. The petitioners also allege violation of their rights under Article 47, which guarantees to everyone the right to fair administrative action as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

26. As I have found in relation to the alleged violation of Article 40 and 43, there was no violation of the rights of the petitioners in respect to the rights guaranteed under Article 47. As is evident from the documents attached to the affidavit in support of the petition and the replying affidavit by the respondent, there was a clear process that took into account the socio-economic needs of the persons affected by the project, and which proposed clear measures to ameliorate the effects of the project on persons affected by the project such as the petitioners.

27. Finally, the petitioners allege violation of Article 56 of the Constitution. This Article provides for the protection of minorities and marginalised groups and states as follows:

56. The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) participate and are represented in governance and other spheres of life;

(b) are provided special opportunities in educational and economic fields;

(c) are provided special opportunities for access to employment;

(d) develop their cultural values, languages and practices; and

(e) have reasonable access to water, health services and infrastructure."

28. The petitioners did not make any submissions with respect to the alleged violation of their rights under this provision of the Constitution, or how they fit within the description of minorities or marginalised groups. Suffice to say that if their claim was based on their socio-economic status, given my finding that the respondents did put in place resettlement mechanisms in the relocation action plan, and that they did give adequate notice to the petitioners and other PAPs to move from the project area, there is no basis for alleging violation of their rights under Article 56.

29. I have also considered the Resettlement Action Plan dated October 2009. While the petitioners in their replying affidavit deny the involvement of Mr. Chepkwony in the project, they have not disputed the contents of the RAP. I note from the RAP that all the PAPs were taken into consideration, both those with title to the properties they occupied and which were affected by the project, but also those, such as the petitioners, who had no titles to the property and were temporary occupiers of the public road reserves. The RAP indicates that the process was carried out in a very consultative manner, with enumeration of the project affected persons being conducted, and their respective needs taken into account. Taking all the factors and evidence presented before me into account, I am unable to find a violation of the petitioners' rights under Article 56.

30. The upshot of my findings above is that there is no merit in this petition. It is therefore dismissed, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 28th day of January 2016

MUMBI NGUGI

JUDGE

Mr. Khamati instructed by the firm of Anthony H Khamati & Co. Advocates for the petitioners.

Mr. Obura instructed by the State Law Office for the 1st and 3rd respondents.

No appearance for the 2nd respondent.