



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 11 OF 2013**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 43(1) AND 28 CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 22, 23, 25, 35, 40, 43, 45, 48, 50, 53, 54, 57 AND 62 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND RULE 11C AND 12 (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**AND**

**IN THE MATTER OF: ARTICLE 11 OF THE INTERNATIONAL CONVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS**

**AND**

**IN THE MATTER OF: ARTICLE 26 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

**BETWEEN**

**BENSON LUSWETY WANYONYI.....PETITIONER**

**AND**

**1. KENYA POWER & LIGHTING COMPANY LIMITED**

**2. THE ATTORNEY-GENERAL.....RESPONDENTS**

**JUGMENT**

## **THE PARTIES**

1. The Petitioner Benson Luswety Wanyonyi was at the time relevant to this Petition a member of the informal squatter settlement scheme known as **Kwa Punda Jomvu Mombasa District**, and purports to bring the Petition in the public interest for alleged violation of Economic and Social Rights within the Republic of Kenya.
2. The First Respondent is Kenya Power and Lighting Company Limited, a public limited liability company whose shareholding is controlled by the Government of the Republic of Kenya (the Government).
3. The Second Respondent is the principal legal advisor of the Government, and is said to be enjoined to the Petition on account of its office under Article 156 of the Constitution of Kenya 2010 (the Constitution).

## **THE PETITION**

4. In his Petition dated 27<sup>th</sup> February, 2013 but filed on 28<sup>th</sup> February, 2013, Benson Luswety Wanyonyi (the Petitioner) sought the following orders –

- (1) A permanent injunction restraining the Respondents, their officers, servants, employees, agents and/or any one working under their instructions from in any way evicting the Petitioner and other residents without prior mutually agreed alternative and suitable location within or on the outskirts of Mombasa;
- (2) An order for payment of compensation by the state and the First Respondent should the court make a finding that the Petitioner has to demolish her house and vacate the land she is occupying;
- (3) Without prejudice to the foregoing and in the alternative, a declaration that in the event of an eviction and prior to such eviction the Respondents shall ensure and provide that:-
  - (a) One year's notice in writing to the Petitioners and all affected persons and the parties herein to hold public hearings on the proposed plans and alternatives and those Petitioners may act in persons or through their advocates and/or representatives;
  - (b) During the hearings, the Petitioners be given opportunity to challenge the eviction decision and to present alternative proposals and issues, on priority rights and interest which shall be incorporated in the final decision;
  - (c) Prior to such meetings and hearings, the Respondents shall furnish the Petitioners in advance with all relevant information in advance and including land records and a comprehensive proposal on the resettlement plan specifically addressing the Petitioner rights in the Petition herein and all rights of vulnerable persons;
  - (d) The proposals above shall incorporate reasonable time for public review, comment, and/or objection to the proposed plan;
  - (e) The Petitioner be accorded reasonable opportunity to obtain legal, technical or other professional advice on the Petitioners rights and interest and other options.

5. The Petition was supported by the Petitioners Affidavit sworn on 27<sup>th</sup> February, 2013, the Petitioner's Statement, the Statements of Mary Ndakula Atanas and Paul Kizumbi Maganga all dated 27<sup>th</sup>

February, 2013 together with the letters dated 30<sup>th</sup> October, 2002 (from the Kenya Power and Lighting Company Limited) to the Chairman of the Petitioner's Settlement Group, a letter dated 2<sup>nd</sup> May, 2002 from the Kenya Power and Lighting Company Limited addressed to Annah Wanyonyi one of the residents of the **Kwa Jomvu Settlement Scheme**, a letter dated 2<sup>nd</sup> May, 2002 addressed to Paul Kizumbi by the Kenya Power and Lighting Company Limited, a copy of minutes of the meeting at Jomvu Mikanjuni by the District Commissioner on **Taking of the plots** by MIBAKWA GROUP (in which the District Officer who represented the District Commissioner informed members to accept the plots under protest as the 4 x 8 metres plots were too small, and finally a letter dated 18<sup>th</sup> December, 2009 from the District Cooperative Officer, Mombasa, to the Regional Manager Coast Region, Mombasa of the Kenya Power and Lighting Company Limited.

6. Lastly, was a letter dated 18<sup>th</sup> July, 2002, from Mibakwa Group addressed to the Managing Director, Kenya Power and Lighting Company Limited, by the Chairman and Secretary of the Mibakwa Group thanking the Kenya Power and Lighting Company Limited for the allocation of settlement plots.

### **THE PETITIONER'S CLAIMS**

7. The Petitioner claims that he is entitled to the fundamental rights and freedoms of the individual which rights include both individual rights and rights in association with others to freedom from torture, cruel and inhuman or degrading treatment contrary pursuant to Article 25 of the Constitution.

8. The Petitioner also lay claims to rights and freedoms both individually and in association with others to inherent dignity and the right to protection of that dignity under Article 28 of the Constitution.

9. The Petitioner also claims under Article 29 of the Constitution the right either individually or in association with others not to be subjected to any form of violence from either the public or private sources and not to be subjected to torture in any manner, whether physical or psychological, and not to be treated or punished in a cruel, inhuman or degrading manner.

10. The Petitioner also claims, individually and in association with others, the right to accessible and adequate housing, and reasonable standards of sanitation, to be free from hunger, and to have adequate food of acceptable quality and education.

11. Lastly, the Petitioner claims both individually and in association with others, the right to acquire and own property of any description in any part of Kenya.

### **THE PETITIONER'S ARGUMENTS**

12. The Petitioner's arguments are set out both in the Petition itself (paragraphs 9 -16 inclusive), and the Petitioner's counsel's written submissions (dubbed the Petitioners **Final Submissions**) dated 13<sup>th</sup> October, 2014 and filed on 28<sup>th</sup> October, 2014.

13. Paragraphs 10 – 16 of the Petition also constitute the basic facts to the Petition. The Petitioner along with others were residing in an area where the First Respondent's power line would pass over. The land where the Petitioner and his family lived constituted part of the way leave for the power line. In or about May, 2002, the Petitioner and other residents of the way-leave area were issued with letters of resettlement to plot Number LR MN/V/2052 the (Settlement Land) which was to be managed as community land by a committee called **JOMVU SETTLEMENT SCHEME COMMITTEE**.

14. The scheme was for the First Respondent to acquire the settlement land, allocate it to all squatters before they demolish the Petitioner's and other residents houses which were to be erected on the way leave. The Petitioner contends that the First Respondent has to-date not settled the Petitioner allegedly because if failed to acquire the settlement land.

15. The Petitioner also contends that he was a resident of the way leave land before the First Respondent erected the power line thereon, and that he is still in occupation of the land under the way leave thus exposing the Petitioner to serious health hazards and radio-active related sicknesses that may lead to loss of life. The Petitioner also avers that the First Respondent threatens to forcefully evict him, and he is unable to make any meaningful developments on the land, and for all these reasons the Petitioner seeks an order of permanent injunction against the First Respondent and other declarations first set out above.

### **THE FIRST RESPONDENT'S CASE**

16. The First Respondent's case is contained in the Grounds of Opposition dated 12<sup>th</sup> July, 2014 and filed on 14<sup>th</sup> July, 2014. The First Respondent contends that the Petitioner has not proved what rights have been violated, that the reliefs sought could be sought by way of an ordinary civil suit, and that the Petitioner being aware that suit is statute-barred, has resorted to filing an unwarranted Petition, and that in any event, the Petitioner has no locus standi. The First Respondent also filed on 8<sup>th</sup> December, 2014 written submissions dated 21<sup>st</sup> November, 2014.

### **THE SECOND RESPONDENT'S CASE**

17. The Second Respondent is said by the Petitioner's counsel, to have entered an Appearance and filed Grounds of Opposition to the Petition, but I could not find any of those documents on record. Apart from a general claim of failure to advise the Government on issues of squatters, there was no cause of action against the Second Respondent. No department of Government was sued and there was no claim of failure, neglect or other malfeasance against any such department. Though rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, provide that no Petition may be defeated by misjoinder or on non-joinder of any person in this case, the non-joinder of any Government Department responsible for housing or settlement of squatters is fatal to the Petition in relation to the Second Respondent. I must therefore dismiss the Petition as against the Second Respondent. The consent therefore remains one between the Petitioner and the First Respondent.

### **THE ISSUES**

18. From both the Petitioners and the First Respondent's written submissions, I perceive these to be the issues for determination by this court.

- (1) Whether the Petitioner has standing (locus standi) to bring the Petition on his own behalf and on behalf of persons un-named in the public interest;
- (2) Whether the Petition is caught up by the doctrine of laches;
- (3) Whether the Second Respondent is a proper party to the Petition;
- (4) Whether or not any of the Petitioners rights were violated;
- (5) Whether any rights were violated and whether the Petition would have been brought by way of an ordinary civil suit;
- (6) Whether any of the prayers, reliefs and remedies sought lie against the Respondents.

### **OF WHETHER THE PETITIONER HAS LOCUS STANDI**

19. The question of locus standi may be answered in two ways. **Firstly** whether the Petitioner alone has standing to bring proceedings under the Constitution, and **secondly** whether he can do so in the public interest.

20. It is now I think a well settled trodden path that every person has a right to commence action alleging that his rights or fundamental freedoms under the Bill of Rights has been denied, violated or infringed or is threatened. That is the effect of Article 22 of the Constitution. It is also a well established path that every person has a right to bring action claiming that the Constitution has been contravened or is threatened with contravention. That is the effect not only of Article 258, but also of Article 3(1) which donates to every person the right and obligation to respect, uphold and defend the Constitution.

21. The Petitioner refers to Article 25 (there shall be no limitation to rights against torture and cruel, inhuman and degrading treatment or punishment) Article 28 (every person has inherent dignity and the right to have the dignity respected and protected), Article 29, (freedom and security of the person, no arbitrary deprivation of freedom or without just cause, torture, (physical or psychological), Article 43(1) (the right to accessible and adequate housing and reasonable standards of sanitation, freedom from hunger, adequate food of acceptable quality and education), and Article 40(1) (the right to acquire and own property of any description and in any part of Kenya).

22. I entirely agree with counsel for the Petitioner that the Constitution is the supreme law and any law inconsistent with it is not only invalid, but is also void to the extent of the inconsistency. Counsel for the Petitioner did not however cite any law which in the context of the Petition herein, is inconsistent with the Constitution.

23. The facts as narrated by the Petitioner himself, and confirmed by the First Respondent are consistent with the conclusion that no right of the Petitioner was, or his fellow squatters were, violated or infringed by either the First Respondent, and certainly none in relation to the Second Respondent.

24. In the case of **KIPSIWO COMMUNITY SELFHEL GROUP VS. THE ATTORNEY-GENERAL [2013]eKLR**, the court summarized the position of locus standi as follows –

- (a) a person recognized in law had to sue on behalf of members, and such members had to be named and identified with precision;**
- (b) the person bringing the action must demonstrate that he has permission to bring the action on behalf of the members, or the people he seeks to represent, if it is a representative suit;**
- (c) the rationale is so as to recognize the person who seek real redress and so that orders are not issued in favour or against people who cannot be precisely identified;**
- (d) if the court does not know who the litigants are, then it becomes impossible for the court to enforce orders.**

25. The Petitioner seeks a declaration (at paragraph 3 of the Petition) that **he** and **residents** of Kwa Punda, Mikindani are entitled to rights enumerated thereat. At paragraph 5 the Petitioner refers to **“other persons residing in Kwa Punda Village”**. At paragraph 6(1) the Petitioner seeks redress for specific violation of rights and of the people whose properties were demolished. In the absence of specific names, the Petitioner cannot purport to bring action on behalf of anybodyelse except himself.

26. “Laches” is a neglect to do something which by law a man/woman is obliged to do.” **SEBAG VS. ABITBOL [1816], 4.....& S.462** per Lord Ellen-borough, C.J. at 463 –

**“The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine, where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he had, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were to be afterwards asserted. But in every case, if an argument against relief which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of the defence must be tried upon principles substantially equitable.”**

27. A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation, *vigilantibus et non dominantibus lex succurrit* – **“a court of equity refuses its aid to stale demands, where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by his laches”**

28. In this case, the events which gave rise to the Petition happened between the year 2000 and 2002. To bring a Petition in 2013 some ten to eleven years later, the Petitioner is not only guilty of laches but his action which can only be brought in as tort is also barred by statute.

29. The Petition even though brought under the Constitution of Kenya 2010, is only subject to interpretation under the repealed Constitution of Kenya as amended and consolidated by the Acts 1969. The new Constitution has no retrospective operation, even though it introduced third generation rights such as the rights to housing and sanitation. But even under the former and current Constitution, the burden of proof still lay upon the Petitioner to show what rights were infringed, how they were infringed and by whom. I cannot say that the Petitioner has acquitted himself on that score.

30. In his Statement dated 27<sup>th</sup> February, 2013 the Petitioner admitted receiving compensation for his crops. Mary Ndakula Atanas through her Statement dated 24<sup>th</sup> February, 2013 confirms that she was paid a total sum of Kshs. 125,000/=. Paul Kizumbi Maganga states that some residents wanted to be paid cash, while others wanted to be relocated. The Petitioner is one of those who moved to relocated.

31. The letter dated 30<sup>th</sup> October, 2002 from the First Respondent’s Regional Manager, Coast Region to the Chairman, Jomvu Squatter Settlement Project clearly stated that the project would be handed over to the representatives of Jomvu sub-plot allottees or their cooperative to enable them develop their plots. The letter of 2<sup>nd</sup> May, 2002, from the First Respondent to Anna Wanyonyi and Paul Kizumbi reiterated that the land was communal to be managed by the Jomvu Settlement Scheme Committee, which would also be responsible for boundary disputes. The minutes of the meeting held on 24<sup>th</sup> January, 2002 confirmed that members got plots and settlement had been completed.

32. Lastly, a letter dated 18<sup>th</sup> December, 2009 by the District Cooperative Officer asking the First Respondent’s Title Deed until office bearers are elected. This last letter I find and hold, absolves the First Respondent from blame as it confirms that the Petitioner was relocated, plots given through ballot, supervised by the Jomvu Settlement Committee. In addition, the Petitioner, among those he purports to bring on behalf of, were paid as follows –

- (a) Anna Nanyama Wanyonyi was paid Shs. 1,552.00 on 13<sup>th</sup> February, 2002
- (b) Benson Luswety Wanyonyi (Petitioner) was paid Shs. 8,200/= on 19<sup>th</sup> February, 2002
- (c) Sarah Simuli Wanyonyi was paid Shs. 2,000/= on 19<sup>th</sup> February, 2002
- (d) Rosemary Nanjala Luswety was paid Shs. 3,000/= on 19<sup>th</sup> February, 2002
- (e) Mary Ndakula Atanas was paid Shs. 40,000/= on 19<sup>th</sup> December, 2000

33. The above reveals that the Petitioners family was paid in accordance with their claims and assessment thereof at the material time. I would therefore agree with both Respondents that the Petition herein is misconceived and is abuse of the constitutional process, and the same has no merit at all.

34. The Petition is hereby dismissed with a direction that the Petitioner and the Respondents do bear their own costs.

35. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 29<sup>TH</sup> day of February, 2016.**

**M. J. ANYARA EMUKULE (MBS)**

**JUDGE**

In the presence of:

Mr. Otwere holding brief Nyange for Petitioner

Ms. Umara for 1<sup>st</sup> Respondent

Mrs. Waswa for 2<sup>nd</sup> Respondent

Mr. Kaunda Court Assistant