



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 547 of 2015

CONSOLIDATED WITH ELC PETITION 883 AND 884 OF 2016

JENKINS MOCHAMA1ST PETITIONER

NICK OMONDI ONYANGO2ND PETITIONER

YUNGO ONYANCHA3RD PETITIONER

JULITA NELIMA OPATA

C/O NELSON OPATA EKIRAPA4TH PETITIONER

JOYCE ATIENO ONYACH5TH PETITIONER

ELIZABETH OUKO6TH PETITIONER

JOSEPH KIBET7TH PETITIONER

CECILIA MWIKALI.....8TH PETITIONER

ALEXANDER MULE.....9TH PETITIONER

ROSE K MBERIA10TH PETITIONER

VERSUS

MARASHI HOLDINGS LIMITED1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI2ND RESPONDENT

NATIONAL POLICE SERVICE3RD RESPONDENT

OCPD EMBAKASI NAIROBI,

APOLLO ONYONI4TH RESPONDENT

OCS EMBAKASI NAIROBI,

VICTOR NYONGESA5TH RESPONDENT

DEPUTY IN CHARGE, AP EMBAKASI,

MR OCHUODHO6TH RESPONDENT

JUDGMENT**Background**

1. This suit, was instituted in 2015 at the High Court as Constitutional **Petition Number 170 of 2015** vide a Petition dated 16th April 2015 but was transferred to the Environment and Land Court on grounds that the issues for determination were the same as issues in **ELC No. 665 of 2011(OS)**. The file was then assigned **ELC No. 547 of 2015** which was later consolidated with **ELC petition 883 of 2016** and **884 of 2016**. Vide directions given on 29.3.2017, the lead suit was **Petition 547 of 2015**. However, when I took over this matter on 22.9.2021, I found that the proceedings are being recorded in **Petition 884 of 2015**.

2. The Petitioners in **No. 547 of 2015** are 10 namely; (1) Jenkins Mochama, (2) Nick Omondi Onyango,(3) Yungo Onyanacha, (4) Julita Nelima Opata, (5) Joyce Atieno Onyach, (6) Elizabeth Ouko, (7) Joseph Kibet, (8) Cecilia Mwikali, (9) Alexander Mule, and (10) Rose K Mberia.

3. The Petitioners in **No. 883 of 2016** are 17 namely; (1) Philip Muturi Kagunda, (2) Sylvester M Mwinzi, (3) Mwikali Mwinzi, (4) Seline Akinyi Ogutu, (5) Rosaita Mbaika Muthoka, (6) Silvine Anyango Odhiambo, (7) Meshak Mwenda s/o Martha Munini, (8) Miriam Waithira Kimani, (9) Joseph Onyango Oraya, (10) Musyoka Kiswili (11) Changangu Kavithe Jeddidah, (12) Caleb Basweti, (13) Mary Ngina, (14) Isabela Mworira, (15) Reuben Gathiya Ngaruiya, (16) Roseline Ann Onyuka, and (17) Roseline Odhiambo.

4. The Petitioners in **No. 884 of 2016** are 26 namely; (1) Edwin Wangoya, (2) Ambrose Mutwa, (3) Veronicah Wachuka Karuba, (4) Peter B Moenga, (5) Mary Ndulu, (6) Silvine Anyango Odhiambo, (7) George Ochola, (8) Samson Gitobu, (9) Henrieta Mukii Kiwese (10) Catherine Wakamu, (11) Geoffrey Gathecha, (12) Francis Nganga Kamau, (13) John Muhiri Mwau, (14) Mary Kagio Ritho, (15) Samwel Mungai Kamau, (16) Nicholas Chelimo Kandie, (17) Alenline Nangila Makhau, (18) Solomon Kirima Mukaria, (19) Aloys Ongoto Nyagot, (20) Gilbert Mumenya, (21) George Odhiambo, (22) Theresa Aoko, (23) Mark Otiende, (24) Allan Waceke, (25) Gladys Nduku Mukoo, and (26) Wambui Wangombe.

5. The respondents in all the 3 files are more or less the same save that in **Petition 547 OF 2015**, the inspector general of police was not sued.

Case for the petitioners

6. A common thread running in all the three petitions is that in paragraph 3 thereof, the Petitioners are acknowledging that the 1st Respondent is the registered owner of the suit property LR No. 9042/130 Embakasi. They claim that they have been residents and settlers on the suit property for a period of over 12 years, and that the 4th petitioner in **Petition No. 547 of 2015** was also a settler on parcel 9042/129. That on diverse dates on 25th, 26th and 27th February 2015, they were forcefully evicted and their houses demolished by the 1st Respondent with the aid of the other respondents despite the existing court orders issued in the cases they had filed namely; **NBI CMCC NO. 544 OF 2013** and **NBI HC ELC NO. 665 OF 2011 (OS)**.

7. The Petitioners thus claimed that the Respondents' actions were *sub judice*; in breach of the Government's policy on resettlement of settlers; unlawful since it was carried out in contravention of court orders; and was unconstitutional for breaching the Petitioners' rights to ownership of property, right to housing and right to fair administrative action. The Petitioners prayed for the following orders:

a) A declaration that the Respondents actions of the 25th, 26th and 27th February 2015, of invading property known as LR No 9042/130 and 9042/129 Embakasi Nairobi with bulldozers and destroying and demolishing the petitioners' property, houses and settlements, and thereafter forcefully and forcibly evicting them therefrom and sealing off the property, was sub judice pending cases, breached Government of Kenya's policy on eviction of settlers and squatters, was illegal and unlawful, and violated the petitioners fundamental Constitutional rights to fair administrative action, to freely acquire and own property of any description in Kenya and to housing, contrary to the provisions of the Constitution, International treaties, practice and usage, on account of which the petitioners suffered direct and indirect loss.

b) General and Special damages (sought in pet 547 of 2015).

c) Compensation, damages and any other relief this honourable court may deem fit to grant (sought in pet 883 and 884 of 2016).

d) Costs and interest.

8. The Petitions were supported by affidavits sworn by Jenkins Mochama dated 16th April 2015; Philip Muturi Kagunda dated 25th July 2016 and Edwin Wangoya dated 25th July 2016 in support of the respective 3 petitions where they buttressed the issues outlined in the petitions.

9. In a further affidavit dated 1st April 2016 sworn by the 1st Petitioner in **Petition No. 547 of 2015**- Jenkins Mochama in response to the 1st Respondent's averments, he states that the latter was well aware of the court order in **HCC 665 OF 2011** since the said order was registered against the title on 21st May 2012. However, despite this, the 1st Respondent still went ahead and registered a transfer to Emirates Business Park on 11th June 2015. By then the 1st Respondent had unlawfully lifted the orders of *status quo* issued on 1.12.2011 in **ELC 665 of 2011 (OS)**.

10. It was also averred that the 2nd Respondent was aware of the court order dated 8th February 2013 issued in **CMCC NO. 544 of 2013** since they had been served and had acknowledged receipt, of which the order was still in force in 2015 when the demolition took place. He also averred that the Sectoral Committee on Planning of the Nairobi City Council Assembly upon investigating the said demolitions found the 2nd Respondent culpable and recommended that the petitioners be resettled and their buildings rebuilt.

11. The Petitioners' submissions are dated 7th February 2019 where they aver that the 1st Respondent's actions were in contravention with court orders issued in the aforementioned two suits and went ahead to use government agencies to effect an illegality in violation of the Petitioners' rights.

12. It is further submitted that the petitioners were never issued with the Enforcement Notice No. 958 dated 3rd February 2015 which gave the petitioners 7 days to demolish their 'illegal' structures, adding that **Section 38(2)** of the **Physical Planning Act** provided that sufficient time should be given.

13. In support of their case. The petitioners relied on the following case laws: **George Kinami Mbugua & Others v Ministry of Roads & Another; Symon Gatutu Kimamo & 587 others v East African Portland Cement Co Ltd [2011] eKLR** and **Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others [2011] eKLR**.

Case for the 1st Respondent

14. The 1st Respondent's case is premised on their reply to the petition dated 13th May 2015 where it denied the claim of the Petitioners, distanced itself from the demolitions of the said structures adding that it was unaware of any court orders, while asserting that the suit land legally belonged to them and the petitioners were trespassers.

15. 1st Respondent's submissions are neither in the file nor on the court's digital platform- the CTS.

Case for the 2nd Respondent

16. The 2nd Respondent filed a Notice of Preliminary Objection dated 29th July 2015 contending that the petition is an abuse of the court process; it contravened **Rule 4(1) and Rule 10(c)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice Rules; and it did not clearly set out the alleged violations. Their submission dated 26th July 2016 are however not anchored on this preliminary Objection. They are premised on their Replying Affidavit allegedly sworn by Absalom Ochieng on 28.1.2016. However no such Replying Affidavit could be traced in any of the three files.

17. In the Supreme Court of Kenya case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**, the court stated that;

“ A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect”.

18. Likewise in the instant matter, the submissions of the 2nd Respondent must fall by the way side for want of pleading.

Case for the 3rd to 8th Respondents

19. The 3rd to 8th Respondents lodged their submissions dated 6th May 2020 but are hereby disregarded as no primary pleadings were ever filed, and therefore face similar fate as those submissions of the 2nd Respondent.

Analysis and determination

20. I have considered the pleadings, submissions, legal framework and relevant authorities. The issue for determination is whether the prayers sought by the claimants in the respective petitions are merited. The Petitioners have decreed that the demolition of their houses and other structures on LR No 9042/130 (and 129) Embakasi Nairobi was unlawful. They aver that there were pending court cases and orders granted in 2011 and 2013 maintaining *status quo* and restraining the 2nd Respondent from evicting them pending determination of the suits.

21. It is trite law that he who asserts must prove. The provisions of **Section 107 of the Evidence Act** stipulate that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

22. **Section 109** of the aforementioned Act further provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

23. This court has flagged out two points for consideration. The first one relates to the alleged violation of court orders. The second one relates to the nature of rights and interests of the Petitioners in relation to the suit properties, which warrant protection.

Court Orders

24. At this juncture, I find it expedient to capture the relevant orders which were allegedly violated; The order in **HC. 665 of 2011 (OS)** reads;

“ Case No. 655 of 2011 order by Hon. Justice Mugo dated 1.12.2011

“IN COURT ON 1ST DECEMBER 2011

BEFORE HON. LADY JUSTICE MUGO

Upon Reading the application presented to this court on 24th November, 2011.

IT IS HEREBY ORDERED.

- 1. THAT pending the hearing and determination of suit, the status quo currently obtaining be maintained.**
- 2. given under my hand and the seal of the court this 1st day of December 2011.”**

25. The order before the Magistrates' court reads:

Case No. 544 of 2013 order by Hon. S. Atambo (M/S) Principal Magistrate dated 8.2.2013.

“ THAT a temporary injunction be and is hereby issued restraining the Defendant from evicting the Plaintiff's from the parcel of land known as L.R. No. 9042/130 (Suit land) or from demolishing or fencing in the Plaintiff's building or interfering with the Plaintiff's possession of the same or alienating, transferring, disposing off or dealing with the suit land in any manner whatsoever pending interparties hearing of this application.

That Applicant to serve for inter-parte hearing on 21st Day of February,2013.” (Emphasize added).

26. What I discern from these orders is that; in the case **Milimani CMCC 544 of 2013**, the orders were issued *ex parte* pending the hearing of the injunction application interpartes. There is no clarification on the substantive orders given in respect of that application. As regards the orders in **HCC 655 of 2011**, the suit property is not mentioned. Further, the nature of the status –quo has not been clarified. It is also apparent that the Respondents herein are not fully captured in the two suits. In **CMCC 544 of 2013**, only the City council appears as a defendant while in **HCCC 665 of 2011**, only Marachi holdings appear as the defendant.

27. Finally, I find that the petitioners have not given a clarification of the status of the two suits as at February 2015. These matters have not been heard alongside the originating Summons hence the court should not be left to guess as to what has happened to these two suits. The Petitioners bore the burden of proving that the aforementioned orders were in force by the time of the alleged evictions in year 2015 but they failed to meet this evidential burden of proof as set out in **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR**, and in **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR**.

The rights and interests of the Petitioners

28. What is the bundle of rights and interests of the petitioners in relation to the suit parcels that are capable of being protected? The Petitioners have made it clear in paragraph 3 of their verifying affidavits that the suit property L.R. 9040/130 belongs to the 1st Respondent and they have availed a certificate of title to that effect. In this regard, the Constitution in **Article 40 (6)** provides that the protection of right to property ... *do not extend to any property that has been found to have been unlawfully acquired.*

29. Another point of concern is; who are the Petitioners, when did they settle on the suit parcel. This court has taken cognizance of an authority availed by the Petitioners in their final submissions namely; **George Kimani Mbugua & 3 others vs. Ministry of Roads and The Attorney General NBI PET 75 OF 2011** of which the residents of the parcel 9042/130 along with other parcels were seeking orders to be declared as legal owners of the suit land parcels as well as compensation for the demolitions which occurred on 20.11.2010. That suit was filed by 3 Petitioners on behalf of the over 3000 residents of the suit parcels of which judgment was delivered on 13.6.2012 whereby reasonable compensation was to be negotiated between the parties.

30. The demolitions in respect of the current suits occurred in February 2015. The question is was this a case of resettling on parcel 9042/130 after the judgment in petition 75 of 2011, Are the current Petitioners fresh settlers after that judgment, or were they part of the over 3000 residents mentioned in that case?. These are questions without answers but they have elicited doubts on who these Petitioners are.

31. It is not lost to this court that the particulars of settlement on the suit land as given by the Petitioners are not generally adding up. I have had a quick glance at the papers of compensation availed by the Petitioners allegedly done in year 2015 and a sampling exercise reveals the following;

- In pet 547, Claimant Joseph Kibet was 42 years old by year 2015 but he developed his property in year 2004 completing it in year 2007.

-In pet 883 of 2016 - Claimant Reuben Gathie was 39 years by year 2015 but he commenced development of his property in year 2002 completing it in year 2006 ; Claimat Jedidah Kavithe and Musyki Kiswili were 53 years old by year 2015 but they developed their respective properties in year 2001.

- In pet 884 of 2016, Claimant Rose Mberia was aged 40 years by year 2015 and she developed her property in year 2002.

32. What emerges is that the Petitioners generally claim to have been in occupation of the suit land from early 2000. However, they have been less than candid on whether they were aware of previous demolitions as well as litigation in the **petition 75 of 2011**. This therefore is a case where the issue of settlement on the suit property (unless the settlement occurred after the 2010 demolitions) appears to be moot.

33. In **Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR**, the court stated that:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic”.

34. On compensation, this court notes that the Petitioners produced an assortment of hand written documents quantifying the loss they suffered in the eviction/demolition. It has been held by courts that special damages must be strictly proved, and to this end, I make reference to the Court of Appeal case of **Ryce Motors Limited & Another v Elias Muroki [1996] eKLR** where it was held that;

“.....There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion.... The Plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence...”

35. Likewise the Petitioners have simply pegged their claims at certain figures without any supporting documents like valuation reports.

36. Taking into account that there was already litigation in other cases like the claim of adverse possession in **HCC 665 of 2011**, and in view of the foregoing analysis, I find that the nature and extent of the rights and interests of the petitioners in the suit parcels have not been adequately ascertained.

Conclusion

37. In **B W K v E K & another [2017] eKLR**, the court stated thus;

“ I associate myself with the decision in H M B Kayondo vs. Somani Amirali Kampala HCCS No. 183 of 1994 [1995] IV KALR 78 that:

The proper way on how one should consider the evidence at the conclusion of the case is to weigh the evidence given by the Defendant against that given by the Plaintiff and to decide the case according to the provisions of Section 3 of the Indian Evidence Act which provides that “ a fact is said to be proved when after considering the matter before it the court either believes it exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists”. In other words, if at the end of the case, the court considers that there is a preponderance of evidence in favour of the Defendant, a decision in favour of the Defendant should result and conversely if the preponderance is in favour of the Plaintiff.”

38. At the conclusion of this case, I find that despite the feeble or none existent responses from the Respondents, the Claimants have not proved their case on a balance of probabilities. The upshot of this judgement is that the prayers sought in the consolidated petitions are unmerited and all the three petitions are dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Otieno holding brief for Obwayo for the Petitioners

Mutinda holding brief for M. Ndenda for the 1st Respondent

Court Assistant: Eddel Barasa