



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ELC PETITION NO. 5 OF 2021

TERESIA WAITITU AND 129 OTHERS.....PETITIONERS

-VERSUS-

PRINCIPAL SECRETARY MINISTRY OF TRANSPORT, INFRASTRUCTURE

AND URBAN PLANING.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. Vide Plaintiff dated the **17th June 2020**, the Petitioners herein sought for the following Reliefs;

- a. Declaration that the threatened evictions by the Respondents violates the principals of the constitution and are thus unconstitutional.
- b. Declaration that failure to issue the Petitioners with Special Identification Number and yet they had been enumerated violates the principle of expeditious, efficient, lawful, reasonable and procedurally Fair Administrative Actions enshrined in Articles 27, 47, 48 and 50 of the Constitution,2010.
- c. The Respondents be compelled to compensate the Petitioners with the Unique Identification cards issued to the beneficiaries of the slum upgrading Programme.
- d. That the said Unique Identification Card be issued through the Advocates on record for the Petitioners
- e. Costs of this suit.
- f. Any other or further Relief that this honorable court considers appropriate and just to grant

BACKGROUND:

2. The Petition herein has been filed and/or mounted by a single Petitioner, namely Teresia Waititu, but it is alleged that same has been filed together with 129 others, albeit whose names have not been disclosed and/or enumerated on the Face of the Petition.
3. However, it is worthy to point out that even though the names of the alleged 129 others have not been enumerated on the Face of the Petition, an authority document has been attached wherein the name of the 129 others, have been enumerated and same has been signed by the 129 others giving authority to Teresia Waititu, to lodge, mount and/or otherwise prosecute the Petition on behalf of the other 129 Petitioners.
4. Be that as it may, it is contended that the Petitioners herein are residents of Soweto zone B, in Kibera, within Nairobi and that same were selected as participants and beneficiaries of Kibera Slum Upgrading Project.

5. It is further stated that the said project, namely Kibera Slum Upgrading Project was being funded by the Government of Kenya and the UN Habitat Mission and that same was meant to facilitate the realization of the Right of access to affordable Housing.
6. It is further contended that the Government of the Republic of Kenya, conducted a sensitization course for the residents of Soweto Zone B in Kibera, with a view to identifying the genuine residents and that in the process, the Petitioners herein were duly enumerated and numbers were thereafter plastered on the respective Petitioners Doors.
7. On the other hand, the Petitioners have contended that after the enumeration exercise, the residents were summoned and/or called on several occasions at Cannan Social Hall in Kibera, to discuss issues relating to Resettlement.
8. Further, the Petitioners have averred that during the last meeting, which was held at the said hall, officials from the Ministry of Lands, Housing, Urban Development together with the Local committee, instructed the Petitioners to pose for a Photo while holding the Special Numbers Plastered on their Doors during the enumeration.
9. However, the Petitioners have contended that during a meeting held on the 16th November 2019, at Nyayo National Stadium, by the Principal Secretary, Ministry of Housing and Urban Development, the Petitioners herein were locked out of the meeting because same did not have the unique identification cards issued by the ministry. In this regard, the Petitioners have contended that same were thus denied and/or deprived of an opportunity to raise their grievances, even though same were bona-fide beneficiaries.
10. It is the Petitioners' further contention, that even though they have requested to be issued with the unique identification cards, the 1st Respondent herein, has failed and/or refused to do so. Consequently, the Petitioners contend that the 1st Respondent has therefore abdicated her mandate and/or duty and therefore violated Article 23 of the Constitution, 2010.
11. On the other hand, the Petitioners have further averred that the process of issuing the unique identification cards by the 1st Respondent and the consequential compensation has since ended yet the Petitioners have neither received the unique identification card nor the compensation.
12. Notwithstanding the foregoing, the Petitioners have further contended that same have similarly been threatened with Eviction pursuant to and in line with the directive by the Ministry, whereby same were directed to vacate by the 30th November 2019.
13. Based on the foregoing, it is therefore the Petitioners contention that by failing and/or refusing to issue the Petitioners with the unique identification cards, yet same are residents of Soweto Zone B and therefore lawful beneficiaries of the slum upgrading project, is tantamount to discrimination and hence violation or infringement of their Constitutional Rights and Fundamental Freedoms.
14. In the premises, the Petitioners have therefore implored the honorable court to grant the Reliefs, which have been enumerated at the foot at the Petition dated the 17th June 2020 and which Reliefs have essentially been reproduced and/or enumerated at the onset of the Judgment herein.
15. It is worthy to point out that the subject Petition has been supported by two affidavits, one sworn by Teresia Wanjiru Waititu and which is sworn on the 17th June 2020 and to which same has attached a single annexure, namely the authority to sue and/or plead. For clarity, the subject affidavit has rehashed the contents of the Petition verbatim.
16. Other than the Supporting affidavit by Teresia Waititu, there is the Supporting Affidavit of David A Joram sworn on the 17th June 2020, which has also been filed alongside the Petition and in respect of which three annexures have been attached.
17. Suffice it to observe, that in respect by the supporting affidavit by the Petitioner herein, no document has been attached and/or exhibited to show and/or exhibit, firstly that the Petitioners are residents of Soweto Zone B.
18. Secondly, though there is an averment that some unique numbers were plastered on the Petitioners doors and thereafter photographs were taken while the Petitioners were holding unique number close to their chests, no such photographs have been attached.
19. Thirdly, the Petitioners herein have also stated that an enumeration exercise was carried out and the Petitioners were duly enumerated, but there is similarly, no evidence of such enumeration.
20. Be that as it may, the affidavit of David A Joram has adverted to the fact that same was duly elected as an official working with the settlement executive committee over- seeing the residents of Soweto Zone B Kibera and that most of the Petitioners in this suit, if not all, are from the area.
21. Upon been so elected, same has worked as such official and that during his engagement he is aware that the Ministry of Housing and Urban Development undertook the slum upgrading programme, firstly in the year 2005 and thereafter the year 2018. For clarity, the Deponent avers that same was a beneficiary of the slum upgrading programme in the year 2005.
22. As pertains to the subject dispute, the deponent herein contends that the Ministry of Housing and Urban Development commenced the enumeration process with a view to ascertaining the Bona-fide residents of Soweto Zone B and those who were fit for resettlement, but the process were not completed.
23. It is further averred that subsequently, it was agreed that the Ministry was to revert and continue with the process, but yet again the

process was not effectively concluded because the Petitioners herein protested insofar as same were not included.

24. Finally, the deponent contends that even though same has demanded to be availed and/or supplied with a copy of the Master Register to enable them to authenticate members who have been enumerated and therefore listed, the Respondents have failed to do so and thus signifying the opaque nature of the process and/or manner in which the Respondents have handled the entire matter.

RESPONSE BY THE RESPONDENTS:

25. Vide Replying Affidavit sworn by Gorge C Omondi on the 1st July 2020, the Respondents have averred as hereunder;

26. The slum upgrading project is a collaboration between the Kenyan Government and the UN Habitat, which is aimed at improving the life's and livelihood of the People living and working in the slums and informal settlements in Urban areas.

27. Owing to the foregoing and with a view to achieving the objectives of the project, the 1st Respondent conducted elections of new settlement executive committee in June 2018 to oversee the Slum upgrading Project of Kibera Soweto Zone B, whereby 17 Officials were elected.

28. It is further averred that the 17 officials, who were elected were representing different Groups in the Community. For clarity, three (3) were ex-official members comprising of the Area Member of Parliament, the Area of County Assembly and the Area chief.

29. It is further averred that after the election process culminating into the election of the new settlement executive committee members, the enumeration of the project affected persons (PAPS), for Kibera Soweto East Zone B, was done between the 13 to the 31st August 2013, where 8, 148 persons were enumerated.

30. It is further averred that thereafter, the verification exercise to ascertain residents were held between November to December 2018 and the exercise was coordinated by teams drawn from the Ministry of Interior and Coordination of National Government, new settlement committee and the State Department of Housing and Urban Development.

31. On the other hand, the Deponent has further averred that the Physical Verification Process was also carried out and in the process a Dispute Resolution Committee was formed to deal with grievance that arose as a result of enumeration and Physical verification exercise. For clarity, it is stated that the grievances window is still open for genuine cases.

32. Nevertheless, it is averred that grievance window is facilitated between the Community itself and that the Number of Beneficiaries after the verification process, which was coordinated by the Ministry of Interior and Coordination of National Government has since gone down to 3663 persons only.

33. It is further contended that the reason why some of the Petitioners herein may not be in the provisional list is because they might not have been enumerated or that they failed the Requisite Test of Qualification during the Physical Verification.

34. On the other hand, it is contended that on the 6th November 2019, a sensitization/relocation briefing was held at Nyayo national Stadium, where almost all the persons affected, (PAPS), were in attendance and consensus of modalities of vacating the site was arrived at and/or agreed upon, whereby the parties agreed to voluntarily move out by the 30th November 2019. For clarity, it is pointed out that the relocation of the tenants and the structure owners from the site was at will.

35. Other than the foregoing, it has also been averred that the demolition of the structures and the clearance of the ground was done by the Project affected Persons voluntarily in the manner agreed. For clarity, it is stated that there was no demolition and/or eviction whatsoever.

36. Further, the deponent has averred that it was also agreed that the project affected persons were to be facilitated and that same were indeed facilitated by being paid the aggrieved sum and that the Petitioners herein were not part of the Genuine Project Affected Persons, in line with the verification process, which was community driven and super intended by the Ministry of Interior and Coordination of National Government.

37. Finally, it has been deponed that the Project Affected Persons voluntarily demolished and removed the structures which were standing on the designated site since November 2019 and that the said site has since been secured, corded and readied for Re-development.

38. Owing to the foregoing, the Respondents have therefore contended that the Petitioners herein were therefore not entitled, firstly to the Unique Identification Numbers, and, secondly, to resettlement. Thirdly, the Petitioners were not also entitled to any compensation whatsoever, insofar as same were not Genuine resident of Soweto Zone, B.

SUBMISSIONS:

39. The matter herein came up for Mention for direction on 25th January 2022, whereupon directions were give on the Petition with a view to determining the way forward towards the disposal of the Petition.

40. However, when the Petition was called out, only the Petitioner was present and hence the court was obliged to give directions. For clarity, directions were given that the Petition to be canvased and disposed of by way of affidavit evidence and thereafter Parties were ordered to file and exchange written submissions.

41. Pursuant to and in line with the directions given by the court, the Petitioners proceeded to and filed written submissions on the 27th December 2021. However, the Respondents herein, despite being given extended latitude to file their written submissions, did not deem it fit and expedient to do so.

42. Based on the foregoing, the court was therefore constrained to set the matter down for Judgment, albeit without the submissions by and/or on behalf of the Respondents

43. Be that as it may, I beg to point out that the submissions by the Petitioners are on record and same have been duly appraised, considered and taken into account.

ISSUES FOR DETERMINATION:

44. Having reviewed the Petition, the Supporting Affidavits, the Replying Affidavit on behalf of the Respondents and having similarly considered the written submissions filed by the Petitioners, the following issues Do arise and are germane for Determination;

a. Whether a Party can introduce Evidence during submissions either by way of an annexure and/or an attachment or at all.

b. Whether the Court is seized and/or possessed of the requisite Machinery to identify, ascertain and/or authenticate the genuine and legitimate Tenants and/or occupiers of Soweto Zone B, Kibera, Nairobi, for purposes of issuance of the Unique Identification Numbers, either as demanded by the Petitioners or at all.

c. Whether the Court can order and/or direct Stoppage of Eviction of the Petitioner(s) herein from the subject premises on the face of the acknowledgment that the Petitioner(s) have since vacated and/or moved out of the premises.

d. Whether the Petitioners are entitled to Compensation in the sum of Kshs 68, 000/= Only, either as claimed or at all.

ANNALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether a Party can Introduce Evidence during submissions either by way of an Annexure and/or an Attachment or at all.

45. The Petitioners herein filed their submissions on the 27th December 2021 and in the course of filing their submissions, the Petitioners have dedicated a portion of their submissions to the introduction of Evidential issues, pertaining to and/or concerning the existence of another matter, namely JR No. E114 of 2021, wherein it is stated that one David A Joram, who has sworn an affidavit in respect of the subject matter, is one of the Applicants.

46. On the other hand, the Petitioners herein have proceeded to and attached various attachments arising from the said JR proceedings, running from pages 54 to 148 of the Submissions.

47. It is important to note that submissions relate only to issues of law, which are premised and/or predicated upon facts and/or evidence that have hitherto been filed by the Parties in the normal course of proceedings. For clarity, facts or evidence cannot be introduced during and/or in the stage of submissions.

48. Based on the foregoing established position, it is my humble finding and holding that the entire documents which have been bound together and placed before the court under the pretext of being submissions, but which are not submissions, are totally misplaced and therefore not worthy of forming part of the court record.

49. In the premises, I hereby proceed to and do expunge the entire set of documents contained from pages 54 to 148 of the bundle, (read Written Submissions), that was filed by and/or on behalf of the Petitioners herein.

50. In support of the foregoing position of the law and to emphasize that evidence cannot be attached to submissions, it is imperative to adopt and restate the holding in the decision in the case of **Daniel Toroitch Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**, where the Court stated as hereunder;

Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.

Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.

ISSUE NUMBER 2

Whether the Court is seized and/or possessed of the requisite machinery to identify, ascertain and/or authenticate the genuine and legitimate tenants and/or occupiers of Soweto Zone B, Kibera, Nairobi, for purposes of issuance of the unique identification numbers, either as demanded by the Petitioners or at all.

51. The Petitioners herein had contended that same were lawful and legitimate tenants of Soweto Zone B Kibera, within Nairobi and that during the slum upgrading project, same were duly enumerated and their doors were plastered with special numbers by officials from the Ministry of Housing and Urban Development.

52. It was further averred that following the enumeration exercise, the Petitioners and others were summoned to various stakeholders meetings at Cannan Social Hall at Kibera, wherein same met with the official from the Ministry of Housing and Urban Development and Members of Local Community and that during one of the meetings, the Petitioners were requested to pose for Photographs with the Special Numbers that had been Plastered on their Doors against their chest.

53. It was further contended by the Petitioners that the Photographs that were taken, while same posed with the Numbers against their chest, signified that same were lawful and bona-fide beneficiaries of the slum upgrading project and in this regard, same were therefore entitled to be issued with the unique identification number, to enable same to benefit from re-settlement and compensation.

54. Nevertheless, the Petitioners have contended that despite being lawful and legitimate beneficiaries of Soweto Zone B slum upgrading project, the Respondents herein denied and/or deprived them of the unique identification number and as a result of same, the Petitioners contend that they have been discriminated upon.

55. Be that as it may, the starting point in this matter is whether the Petitioners herein have placed before the Court any evidence that same were ever enumerated and thereby assigned any special numbers that were plastered against their doors, either as alleged or at all. In this regard, if any such numbers were ever plastered against the Petitioners Doors, nothing would have been easier than for the Petitioners to say my number was so and so.

56. On the other hand, the Petitioners herein have also contended that after the enumeration exercise, same were invited to attend a meeting at Cannan hall, involving the officials from the Ministry of Housing and Urban Development, as well as members of the Local Community and that during the said meeting, same were asked to pose for Photographs with the Special Numbers against their chest. In my humble view, such photographs, if any, would also have been helpful, in ascertaining whether or not the Petitioners herein were duly enumerated.

57. Notwithstanding the foregoing, it is also worthy to note that the process in question was being conducted by the Ministry of Housing and Urban Development, in conjunction with the Ministry of Interior and National Coordination and in consultation with the Local Community and in this regard, the Petitioners herein could very well procure a Letter and/or Document from the Local Committee and/or even the Area Chief to confirm the fact that same are residents of Soweto Zone B, in the manner claimed.

58. It is worthy to recall that the Petitioners herein did not attached and/or annex any Document whatsoever, to their supporting affidavit and hence there is no iota of evidence to prove and/or vindicate the claims made by the petitioners or at all.

59. Suffice it to observe, that the Burden of proof lies with the Petitioners to prove their claim on a Balance of Probability, before the Respondents are called upon to rebut the allegations that has been proven, established and/or laid against same.

60. In support of the foregoing position, I can do no better than to adopt and rely on the Decision in the case of **Dr. Samson Gwer & 5 others v Kenya Medical Research Institute (KEMRI) & 3 Others [2014] eKLR**, where the Supreme Court observed as hereunder;

[47] It is a timeless rule of the common law tradition ^{3/4} Kenya's juristic heritage ^{3/4} and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be *evidence*, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48] The petitioners' case is set around the constitutional right of freedom from discrimination (Constitution of Kenya, 2010, Article 27). It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.

[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "*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.*"

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52] The allegations of discrimination are captured in various e-mails, affidavits, and the petition itself. The petitioners have not denied that they were engaged in an employment contract with the 1st respondent, which contract expressly stipulated the terms of engagement. The affidavit of Magaret Rigoro brings this out, and also explains how foreign researchers were engaged by the 1st respondent, even though 1st respondent had no control over the terms of their employment. This has not been controverted by the petitioners, who merely claim that such lack of control had exposed them to discrimination.

61. In the subject matter, the Burden of Proof was on the Petitioners to place before the Court sufficient material to establish and to authenticate that indeed same were lawful and legitimate beneficiaries of the slum upgrading project, but in the end no scintilla of evidence was placed before the court.

62. I am afraid that the Petitioners herein are intent on attracting and/or procuring a favorable judgment, but albeit on speculation and hypothesis, which cannot meet the statutory threshold underscored vide the provisions of Sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya. Consequently, the Petitioners are not entitled to the reliefs sought.

63. Notwithstanding the foregoing, the other important issue which needs to be addressed is whether or not this Court has the requisite machinery to identify and/or ascertain the genuine occupants, occupiers and/or tenants of Soweto zone B, Kibera area and therefore worthy of being issued with the unique identification numbers.

64. It is important to note that the process towards the ascertainment and authentication of who are truly the genuine occupiers, tenants and owners of premises within Soweto zone B area, was indeed being undertaken by the Ministry of Housing and Urban Development, Ministry of Interior and National Coordination in conjunction with the local Committee and the community. Besides, the process also involved enumeration and verification.

65. From the foregoing, it is evident and/or apparent that the process was labor intensive and required visiting the ground and consulting various stakeholders, including the Provincial administration, the Local Committee as well as the Local Community, before ascertaining who are truly the genuine occupants, tenants and beneficiaries of Soweto zone B area.

66. Arising from the foregoing, it is my finding and holding that a Court of law, whose mandate is limited and circumscribed and in any event not inquisitorial, cannot inquire into who is and/or is not a true tenant, occupier and/or legitimate beneficiary of the slum upgrading process, either in the manner proposed by the Petitioners or et al.

67. Based on the foregoing, it is therefore my finding and holding that other than the fact that the Petitioners did not supply and/or avail to the Court any Iota of evidence to show that same were residents and/or occupiers and/or tenants of the subject area of concern, same have similarly failed, to lay before the Court evidence, to establish that this Court has the necessary machinery, to carry out and/or undertake the necessary process of ascertaining whether or not the Petitioners ought to be issued with the unique identification numbers, whatsoever and howsoever.

68. In my humble view, the ascertainment of whether or not the Petitioners are worthy of being issued with the unique identification numbers, either as claimed or at all is a Policy decision, subject to proof of occupancy, residents and/or ownership of structure within designated area, namely Soweto B area within Nairobi. For clarity, Proof of same would require involvement of various Stakeholders and visitation to the Locus in Quo and interviewing the Residents of the Area.

ISSUE	NUMBER	THREE:
<u>Whether the Court can order and/or direct stoppage of Eviction of the Petitioners herein from the subject premises on the Face of the acknowledgment that the Petitioners have since vacated and/or moved out of the premises.</u>		

69. The Petitioners herein have sought for various Reliefs, including but not limited to an Order that the Court be pleased to declare that the threatened Evictions by the Respondents, violate the principles of the Constitution and same are thus Unconstitutional.

70. Vide the foregoing Order, the Petitioners are essentially contending that same are exposed to eviction and that the imminent eviction are illegal and unlawful. For clarity, the Petitioners are therefore seeking Declaratory orders against the imminent Eviction as well as stoppage thereof.

71. Nevertheless, I wish to point out that despite the declaratory Order sought, it has been conceded by the Petitioner, namely Teresia Wanjiku Waititu that same moved out of her house before compensation and that same is no longer living and/or residing (sic) in the Suit Premises.

72. Based on the fact that the Petitioner and/or the only Petitioner before this Court, has confirmed that same has since moved out of the suit premises long before the filing of the subject Petition, the question is whether the orders of an injunction to stop the eviction can issue and/or be granted. Certainly, no order of injunction, can issue and/or be granted once the act complained of has already accrued and/or occurred.

73. As concerns the issuance of the Declaratory Order, I must point out that no evidence was shown and/or placed before the Court to underscore the nexus between the Petitioners and the suit premises and more particularly, whether the Petitioners herein, were indeed persons

affected by the project, (PAPS), in line with the enumeration and verification process, that was put in place by the first Respondent.

74. Based on the foregoing, it is my finding and holding that on both accounts neither the Declaratory order nor the Permanent Injunction can issue as against the Eviction alluded to or at all. Simply put, a Court of Law cannot Issue Orders in Vanity.

ISSUE NUMBER FOUR:

Whether the Petitioners are entitled to Compensation in the sum of Kshs 68, 000/= Only either as claimed or at all.

75. Other than the Reliefs relating to an Order for the issuance for the unique identification cards and Declaration that the threatened eviction of the Petitioners by the Respondents are unconstitutional, the Petitioners herein also sought for Compensation, in the sum of Kenya shillings 68,000 only.

76. Even though, it has not been expressly stated how the sum of Kenya shillings 68,000 only, has been arrived at, it appears that the claim for Kenya shillings 68,000 Only, is premised on the fact that same was being paid to and in favor of the project affected persons, who were dully enumerated, verified and therefore approved for resettlement.

77. However, it must not be lost on the Court that the persons who ere entitled to the compensation, whatever the amount of compensation, were the persons who were dully verified through the established mechanism put in place by the 1st Respondent, in conjunction with the Local committee and the Community.

78. To the extent that the Petitioners were neither approved nor verified by the Ministry of Housing and Urban Development, the Local committee as well as the community, same cannot now approach the Court, which is ill-equipped to carry out the verification process to make the award.

79. Notwithstanding the foregoing, even assuming that this Court could be able to pass the test that the Petitioners herein were entitled to receive some payments, let alone the sum of Kenya shillings 68,000 Only, then it would still be incumbent upon the Petitioners to place before the Honorable Court evidence to prove one, entitlement to such compensation and two, evidence of loss, to warrant an award thereof.

80. Suffice it to note that the claim for Kenya shillings 68,000 Only, which Petitioners herein are claiming has neither been pleaded nor alluded to in the body of the Petition, or at all. For clarity, same has only been alluded to in paragraph 13 of the Supporting Affidavit and no more.

81. In my humble view, the Claim for Kenya shillings 68,000 Only, is a claim for Special Damages and hence needed to have been particularly pleaded and specifically proved before any Judgement could be endorsed and/or entered in favor of the Petitioners.

82. In support of the foregoing position, I beg to adopt and ratify the Decision in the case of **Idi Ayub Omari Shabani versus Nairobi City Council [1984]eKLR** which states as hereunder:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

83. I beg to remind myself that what is before me, is a Constitutional Petition and not an Ordinary claim, where the litigant is seeking a Liquidated and/or Special Damages. Nevertheless, it is worthy to recall that even in Constitutional Petition, Petitioners are enjoined to plead their claims with reasonable specificity and particularity and thereafter to avail Evidence to prove their claims to the requisite Standards.

84. In a nutshell, what I am saying is that even Petitioners in a Constitutional Petition are not exempted from the legal strictures that require specificity in pleadings and proof of claims, before same can be awarded by a court of law.

85. For clarity, the point herein, was ably elucidated and/or illuminated by a five (5) Judge bench of the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, where the Court stated inter-alia;

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

86. In short, the Compensation sought for, (*which was only mentioned in passing vide the Supporting Affidavit and not otherwise*) has neither been proven nor been justified. Consequently, same is not awardable in favor of the Petitioners.

FINAL DISPOSITION:

87. Having reviewed all the issue enumerated for determination, I come to the conclusion that the subject Petition is not only premature, but same is similarly misconceived and Devoid of any lawful basis.

88. Consequently and in the premises, the Petition be and is hereby Dismissed.

89. I have agonized over the issue pertaining to cost and more particularly, taking into account the peculiar status of the Petitioners, as well as the import and tenor of **Articles 10, 27, 42 and 43 of the Constitution, 2010.**

90. Be that as it may and having painstakingly gone through the agonizing process, I come to the conclusion and in any Event, the Order that commends itself to me, is that Each Party Shall bear Own Costs.

91. It is hereby Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mokaya Omwoyo Petitioners

Ms Ndundu h/b for Ms Chimau for the For Respondents