



Memba & 3 others (Suing on their own behalf and behalf of their families and all the members of the over 500 members of Upendo Group All Residents and Ajofato Garrages Wilson Airport Welfare being residents and occupiers of Land Parcel N0.209/1064) v Transmara Printers and Stationery Limited & 4 others; Economic and Social Rights Centre (Hakijamii) (Interested Party) (Environment & Land Petition E043 of 2021) [2022] KEELC 3339 (KLR) (23 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E043 OF 2021**

EK WABWOTO, J

MAY 23, 2022

IN THE MATTER OF: THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE CONSTITUTION OF KENYA. IN THE MATTER OF: ARTICLES 1, 2(5)(6), 3, 10, 20, 21, 22, 23, 27(4), 28, 35, 40, 43(1)(B) 47, 48, 60, 63, 64, 159, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA. IN THE MATTER OF: RULES 3, 4, 10, 21 AND 13 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURE RULES, 2013. IN THE MATTER OF: THE OF SECTIONS 152 B, C, D, E, F, G OF THE LAND ACT 2012. IN THE MATTER OF: THE OF SECTIONS 2, 3, 4, 5, 6, 7, 10, 11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015. IN THE MATTER OF: REGULATION 63(1)(2), 66-69 OF THE REGULATIONS, 2017. LAND. IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), ARTICLE 11 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (IECSR), ARTICLE 17 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND ARTICLE 18 OF THE AFRICAN CHARTER OF HUMAN AND PEOPLE RIGHTS (BANJUL CHARTER). IN THE MATTER OF: IN THE MATTER OF THE UNREASONABLE AND UNJUSTIFIABLE DEPRIVATION OF PROPERTY THROUGH UNJUST EVICTIONS

BETWEEN

**ELIJAH MEMBA 1ST APPLICANT
NORAH GESARE 2ND APPLICANT
JENIFFER ADHIAMBO 3RD APPLICANT
FRANCIS OCHORA AUTA 4TH APPLICANT**



SUING ON THEIR OWN BEHALF AND BEHALF OF THEIR FAMILIES AND ALL THE MEMBERS OF THE OVER 500 MEMBERS OF UPENDO GROUP ALL RESIDENTS AND AJOFATO GARRAGES WILSON AIRPORT WELFARE BEING RESIDENTS AND OCCUPIERS OF LAND PARCEL NO.209/1064

AND

TRANSMARA PRINTERS AND STATIONERY LIMITED 1ST RESPONDENT
NAIROBI METROPOLITAN SERVICE 2ND RESPONDENT
MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

AND

ECONOMIC AND SOCIAL RIGHTS CENTRE (HAKIJAMII) INTERESTED PARTY

JUDGMENT

1. This judgement is in respect to the amended petition dated 28th October 2021 and the petitioner's application dated 9th November 2021.
2. In the petition, the petitioners have described themselves as residents of Upendo II village situated on the land reference LR No. 209 112075 (as per the mother title) and subsequently, LR No. 209/1064 (most recent subdivision) situate within Nairobi City next to Langata sub-county offices adjacent to Wilson Airport.
3. The 1st Respondent is a private entity incorporated in Kenya who undertake their business at their offices located at Kirinyaga Road. They have been sued as the registered owner of the suit property.
4. The 2nd Respondent is the Nairobi Metropolitan Services, established under Article 187 of *the Constitution* of Kenya where part of the functions of the County Government of Nairobi were transferred to the National Government and are effected through the Nairobi Metropolitan Services.
5. The 3rd Respondent is the government ministry that is charged with the responsibility of public administration and internal security.
6. The 4th Respondent is the National Land Commission duly established under Article 67 of *the Constitution* of Kenya, as well as the *National Land Commission Act* 2012.
7. The 5th Respondent is the Attorney General, whose office f established under Article 156(1) of *the Constitution* and is the Principal Legal Adviser to the Government.
8. The 1st interested party is a non-governmental organization (NGO) formed in 2004 and registered in 2007 that works with marginalized groups to support them to claim and realize their economic and social rights and improve their livelihoods



The Petition

9. In the amended petition filed herein, the petitioners sought for the following orders: -
- a. A declaration that the action of the 1st, 2nd and 3rd Respondents through their agents, servants, employees and/or anyone acting under their instructions to demolish the homes erected at Upendo II Village was Unconstitutional and breached various laws and regulations stated herein.
 - b. A declaration that the 1st, 2nd and 3rd Respondent through their agents, servants, employees and/or anyone acting under their instructions violated the Petitioners rights under *the Constitution* specifically: Article 28-dignity, 29-freedom and security of the person, 32-freedom of religion, 40- property, 43-the right to accessible and adequate housing and the right to education, 47-the right to fair administrative process, 53- the rights of the child, 54- the rights of person with disability, 57- the rights of older members of the society.
 - c. A declaration that any Eviction Notices and any actual removal of the Petitioners and all persons residing in the affected areas must be done in strict compliance with *the Constitution* and the law and specifically Section 152C, F and G of the *Land Act* No. 6 of 2012 and Regulations 63 and 67 of the Land Regulations (Legal Notice No. 280 of 2017) and, at the minimum must be preceded by the relevant compensation and or resettlement as required by law.
 - d. An Order of Compensation as a result of the demolitions which were orchestrated by the 1st Respondent through their agents, servants, employees and/or anyone acting under their instructions on the 20th October 2021 wherein homes, business structures and other amenities were destroyed without prior notice. The compensation be based on the general loss and damage resulting from the evictions, the suffering and anguish caused to the population by the said demolitions and evictions, and the specific damage to their property comprising of houses, business premises and household as well as business items self-valued by the community to the tune of Kenya Shillings One Fifty Million 150,000,000.
 - e. A permanent injunction restraining the 1st 2nd and 3rd Respondents or their Agents/Servants or Assignees from evicting, harassing or in any other way interfering with the Petitioners or any members of Upendo II Village and thus ensuring that the Petitioners enjoy the occupation, use, and utilization of the properties in the affected areas.
 - f. An order that the 3rd Respondent monitors the compliance of the declarations and orders issued by this Court in this cause and to promptly bring to the attention of this Court or any Court of competent jurisdiction any non-compliance, by the Respondents or anyone else, with the declarations and orders of this Court.
 - g. Cost of this petition.
 - h. Any other or further relief that this Honourable Court may deem fit and just to grant
10. The amended petition is supported by the affidavit sworn by Elijah Memba on 22nd October 2021. The Petitioners also filed their submissions dated 21st January 2022.



11. During the pendency of the petition, the petitioners filed an application dated 9th November 2021 which application sought to cite the 1st Respondent for contempt of court orders issued on 2nd November 2021 which orders where to the effect that:

“Pending the hearing and determination of the petition, a conservatory order be and is hereby issued restraining the Respondents , either by themselves , their assigns , representatives, employees or agents from further carrying out the threatened demolition, forceful removal or causing in any other way the destruction of the houses, schools , business , and other properties situated without complying to the satisfaction of this court as condition, precedent issuance of the statutory notice , a resettlement action plan, compensation and provision of attendance housing or shelter”.

12. Pursuant to the directions issued by the court on 27th January 2022, it was directed that the application dated 9th November 2021 be heard alongside the main petition.

Petitioners case

13. It was pleaded that on or about 20th day of October 2021, at around 1930 hours and at the instigation of the 1st 2nd and 3rd Respondents the in famous caterpillar was brought into the neighborhood flanked by a member of policeman drawn from various police stations around Nairobi city together with officials of the 1st and 2nd Respondents and at around 2100 hours the eviction begun ramping through the business premises as well as the residential premises effectively evicting close to 100 households without warning or adhering to any set procedure according to the laws of Kenya.
14. It was averred that the actions of the 1st 2nd and 3rd Respondent breached several provisions of *the constitution* including as well as the relevant laws of eviction by not following the set procedure as uncaptured within Section 152 C and 152 D of the land laws (Amendment) Act, 2016 which brought forth far reaching charges in management of evictions which includes the following procedure: -
- a. Be preceded by the presentation of the formal authorizations for the action;
 - b. Where groups of people are involved, government officials or their representatives to be present during an eviction;
 - c. Be carried out in a manner that respects the dignity, right to life and security of those affected;
 - d. Include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
 - e. Include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; f) Include mechanisms to protect property and possessions left behind involuntarily from destruction;
 - f. Respect the principles of necessity and proportionality during the use of force; and
 - g. Give the affected persons the first priority to demolish and salvage their property.
15. Counsel for the Petitioners, Dr. Orago learned counsel submitted inter-alia that the petition was merited and deserving of the prayers sought. He identified four (4) issues for determination.
- i. Whether the Petitioners have the requisite locus standi to present this petition.
 - ii. Whether the Respondent violated the petitioners rights?



- iii. Whether the act of demolishing the homes and business belonging to the petitioners and their attempted eviction was just.
 - iv. What are the appropriate orders to be made by the court.
16. Learned Counsel submitted that as the evictions and demolition are expressly admitted by the respondents, it is common ground that such evictions did indeed take place. It was also his submission that there was no court order prior to the demolitions.
 17. The petitioners assert that the rights that were violated by the respondents, namely the right to dignity, security of the person, housing under Article 43 and the rights of children and the elderly guaranteed under Article 53 and 57 respectively apply horizontally as against the 1st respondent. It is also their contention that the right to housing also entails the duty not to do anything to violate the right, and the need for due process to be followed. With regard to the liability of the 2nd and 3rd respondents, the petitioners submit that these respondents are liable because they supervised the demolition; that as state actors, they have a duty to ensure that there is no violation of rights.

1st Respondent's case

18. The 1st respondent denies the bulk of the averments by the petitioners, terming them as unsubstantiated and inadmissible in law. Its case as presented by its learned Counsel, Mr. Suge it was submitted that they were the registered owners of the property and therefore hold an indefeasible title. In support of its claim, they produced a certificate of title issued in 1987, official search, land rent and rates payment receipts and an authenticated map.
19. It was further stated that the inhabitants of the suit property were given sufficient notice of more than six months and that their structures were marked for demolition more than three months before the eviction and that the evictions were carried out by a multi -agency government team comprised of the officers from the 2nd and 3rd Respondents.
20. In their written submissions dated 26th January 2022, Counsel outlined three issues for determination, which included the following; Whether the Petitioners have the locus to present the Petition, whether the Petitioners' petition meets the threshold for constitutional petitions and whether the 1st Respondent infringed on the rights of the Petitioners.
21. On whether the Petitioners have the locus to present the Petition, Counsel submitted that the Petitioners have brought this Petition on behalf of over 500 members of Upendo Group All Residents and Aljofato Garages Wilson Airport Welfare. It was argued that Articles 22 and 258 of *the Constitution* allow any person to act on behalf of another who cannot act in their own name. The names of the 500 members of the welfare association had not been provided nor had they produced any authority from the said welfare to bring the Petition on their behalf and that whereas Articles 22 and 258 of *the Constitution* expand the locus of parties, proper parties have to be before the court. Counsel relied on the following cases to support their position; Mumo Matemu v Trusted Alliance & 5 Others, Beatrice Wanjiru & 2 Others v Attorney General & Another [2017] eKLR, Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company and Another [2013] eKLR and Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR.
22. On whether the Petition meets the threshold for constitutional petitions, counsel referred to the case of *Anarita Karima Njeru vs R (1) 1979 KLR 154* and submitted that the Petitioners were landlords who were collecting rent from the residents and were not residents themselves. The 1st Respondent produced a sale agreement made by the 1st Petitioner for the sale of some units prior to the demolition. The eviction therefore had not directly affected them but had denied them revenue in form of rent and



on that basis the Petition does not meet the threshold for a constitutional petition since the Petitioners have not demonstrated how their rights have been infringed.

23. On whether the 1st Respondent infringed on the rights of the Petitioners, it was argued that the 1st Respondent was the registered owner of the suit property and hence therefore pursuant to Section 24, 25 and 26 of the *Land Registration Act* No. 3 of 2012, the 1st Respondent had absolute ownership rights of the land and the same could not be public land as alleged by the Petitioners. It was further submitted that the Petitioners were trespassers on the property and hence could not allege any infringement of their rights.
24. Counsel for the 1st Respondent also brought to the court's attention that in the case of *William Musembi & 13 Others v Moi Educational Centre Co. Ltd & 3 Others* [2021] eKLR, the 1st Petitioner herein was the 4th Petitioner in that case and the L.R number referred to in that matter was the same as the one the Petitioner had used to file this matter. It was also submitted that while indeed the evictions were carried out, it is not liable for the alleged violation of the petitioners' rights as it is a private citizen, and that it is only the state that is liable with respect to the petitioners' rights.
25. The 1st respondent avers that the petitioners had illegally and intentionally encroached on its land, constructed structures, and wasted and damaged the original state of the suit property without any colour of right; that despite the petitioners' claim that they are poor, some, such as the 1st Petitioner and many others, were landlords within Upendo Villages earning revenue from the illegal structures.
26. Accordingly, the 1st Respondents contended that the petition ought to be dismissed.

The 2nd, 3rd and 5th Respondent's case.

27. The Petition was similarly opposed by the 2nd, 3rd and 5th Respondent herein. In opposition to the same, they relied on the grounds of opposition dated 24th January 2022.
28. In their grounds of opposition, the 2nd, 3rd and 5th Respondents argue that the petition is frivolous, misconceived and otherwise an abuse of the court process, does not disclose any cause of action against the respondents, and does not disclose any constitutional violations or breaches by the respondents. They also argued that the orders sought by the petitioner are not tenable against them as no sufficient grounds have been advanced to warrant the grant of the orders.
29. In their written submissions dated 27th January 2022 filed by Mr. J. Motari Matunda learned counsel, three issues were outlined for consideration by the court. These were; whether the Petitioners had disclosed the representative nature of their petition, whether the petition had met the threshold for constitutional petitions and whether the demolitions were carried out in accordance with the law.
30. Counsel submitted that the Petitioners had failed to identify the members whom they claim to represent by attaching the list of the said members and having failed to do so their claims remain frivolous, vexatious and an abuse of the court process. In support of this position, reference was made to the case of *Kipsiwo Community Self Help Group v Attorney General and 6 Others* [2013] eKLR.
31. On whether the Petition meets the threshold for constitutional petitions, counsel equally referred to the case of *Anarita Karima Njeru vs R (1) 1979 KLR 154* and submitted that the Petitioners were landlords who were collecting rent from the residents and were not residents themselves. It was submitted that the Petition failed to set out with precision the rights, the law and the violation which has been meted upon the Petitioners.



32. On whether the demolitions were carried out in accordance with the law, Counsel submitted that notice had been issued and even some tenants had vacated the premises in compliance with the said notice.
33. Accordingly, the court was urged to dismiss the petition.

Issues for determination

34. The Court has considered the cases put forward by the Petitioners, the Respondents, interested party, the submissions of counsels and the authorities referred to therein and is of the view that the following are the main issues for determination: -
 - i. Whether the Petitioners have the locus standi to present this Petition?
 - ii. Whether the Respondents violated the Petitioners rights?
 - iii. Whether the 1st Respondent was in contempt of the court orders issued on 2nd November 2021?
 - iv. Remedies if any?

Issue No. 1

Whether the Petitioners have the locus standi to present this Petition?

35. *The Constitution* of Kenya 2010 has expanded locus standi beyond the pre-2010 constitution as was expressed in the case of Mumo Matemo –vs- Trusted Society of Human Rights Alliance & 5 Others when the court stated as follows–

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the constitution* by necessity and logic broadens access to the courts. In this border context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this; we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*.”

36. *The Constitution* has also expended the remedies that may be granted by courts as provided in Article 23 as follows: -

Article 23. Authority of courts to uphold and enforce the Bill of Rights

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of



a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.

37. In view of the foregoing, it is evident that, Article 22 of *the Constitution* stipulates that court proceedings may be instituted by a person acting on behalf of another person who cannot act in their own name, a person acting as a member of, or in the interest of, a group or class of person, a person acting in the public interest or an association acting in the interest of one or more of its members. Article 23 of *the constitution* further stipulates that for any further proceedings brought under Article 22, a court may grant appropriate relief.

38. Article 22 expands the rules of standing and allows any person to file a petition alleging that his rights or those of another, or indeed those of a group, have been violated or are threatened with violation. It provides as follows:

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or

39. The Petitioners averred that they were residents of Upendo II Village and they had filed the Petition on their own behalf and also on the behalf of their families and all the members of the over 500 members of Upendo Group All Residents and Ajofato Garages Wilson Airport Welfare being residents and occupiers of Land Parcel No. 209/1064. As such this court finds that the Petitioners had the locus standi to institute the suit and the Respondent's objection to the same on the lack of locus standi is misplaced.

Issue no. 2

Whether the Respondents violated the Petitioners rights?

40. In its interpretation of the above provisions, this court has taken the view that the Bill of Rights applies both vertically as against the state, and horizontally against private persons, and that in appropriate



cases, a claim for violation of a constitutional right can be brought against a private individual. Article 2(1) and 20(1) of *the Constitution* are clear that the Bill of Rights applies and binds all state organs and all persons-see the decision of the court in Abdalla Rhova Hiribae & 3 Others -vs- The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya -vs- Betty Sungura Nyabuto & Another Petition No. 21 of 2010 B.A.O & Another -vs- The Standard Group Limited & 2 Others Petition No. 48 of 2011 and Duncan Muriuki Kaguuru & Another -vs- Baobab Beach Resort & Spa Ltd High Court Petition No. 233 of 2012. Consequently, should the court be satisfied that in the circumstances of this case there was a violation of the rights of the petitioners by the respondents, then the 1st respondent would be liable along with the state for such violation. It is undisputed that the eviction did take place as alleged, and that the petitioners were as a result removed from the place they knew as home. The petitioners allege that the eviction took place on 20th October 2021. All the petitioners' structures which had been erected on the subject land had been demolished. The petitioners allege that there was no notice of the intended eviction given to them neither was the eviction and demolition done in compliance with the law.

41. In the case of Symon Gatutu Kimamo & 587 others V East African Portland Cement Co. Ltd [2011] eKLR the Court, while relying on the UN General Comment No. 7 on the Right to Adequate Housing affirmed that: 'the prohibition of forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Human Rights Covenants' The UN General Comment No. 7 provides for the procedural protection and due process to be followed during forced evictions which include: a) an opportunity for genuine consultation with those affected; b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; e) all persons carrying out the eviction to be properly identified; f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; g) provision of legal remedies; and h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts. In invoking Article 2(5) and (6) of *the Constitution*, victims of forceful evictions have also sought to rely on the UN Basic Principles and Guidelines on Development based Eviction and Displacement (UN Eviction Guidelines) The UN Eviction Guidelines require the State to ensure that evictions only occur in exceptional circumstances and any eviction must be: (a) Authorized by law; (b) Carried out in accordance with international human rights law; (c) Undertaken solely for the purpose of promoting the general welfare; (d) Reasonable and proportional."
42. Having considered the Petition and the evidence that was tendered herein, it is the finding of this court that the eviction of the petitioners was unlawful for having been carried out with no lawful order for its execution and with no notice given to the petitioners.

Issue No. III

Whether the 1st Respondent was in contempt of the court orders issued on 2nd November 2021?

40. The court is also called upon to decide on whether this court should commit the alleged contemnors for contempt of the court orders given on 2nd November 2021. The grounds to be proved in contempt proceedings, according to G. Bonnie and N. Lowe, "The Law of Contempt" 4th Edition, London Butterworth's, 2010, P.129 are:
- a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding the Respondent;



- b) The Respondent had knowledge of a proper notice of the terms of the order;
 - c) The Respondent has acted in breach of the terms of the order; and
 - d) The Respondent's conduct was deliberate.
44. Contempt of court has been defined as conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. (See Osborne's Concise Law Dictionary). In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others* [2015] eKLR it was stated as follows:
- “Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”
- Halsbury's Laws of England, Vol.9 (1) 4th Edition provides as follows:
- “Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury.”
45. The elements of civil contempt were laid out by the Law Commission of New Zealand in 'Contempt in Modern New Zealand' that was cited in *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR as follows:
- “There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:
- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
 - (b) the defendant had knowledge of or proper notice of the terms of the order;
 - (c) the defendant has acted in breach of the terms of the order; and
 - (d) the defendants conduct was deliberate.”
46. Similarly in the case of *Samuel M.N Mweru & Others* (Supra) that was cited by both parties, the Court adopted the four elements necessary to be proved for consideration of an application for contempt. As was held in the case of *Katsuri Limited vs. Kapurchand Depar Shah* [2016] eKLR, where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined and proved. The court went further to hold as follows:
- “A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to contempt.”



47. It is not in dispute that on 2nd November 2021, this court gave the following orders; “Pending the hearing and determination of the petition, a conservatory order be and is hereby issued restraining the Respondents , either by themselves , their assigns , representatives, employees or agents from further carrying out the threatened demolition, forceful removal or causing in any other way the destruction of the houses, schools , business , and other properties situated without complying to the satisfaction of this court as condition, precedent issuance of the statutory notice , a resettlement action plan, compensation and provision of attendance housing or shelter”.
48. It is also not disputed that the said orders were subsequently served and the service of the same was not disputed neither was the existence of such orders at least according to the submissions that were filed herein by the parties.
49. If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts have to be respected and protected at all costs. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts, whether inside or outside courts, which tend to undermine their authority and bring them in disrepute and disrespect.
50. When the court exercises this power, it does so to uphold the rule of law and administration of justice. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly and decisively with contemnors.
51. It is trite law that in order for the Court to cite a party for contempt, the Court order must be clear and unambiguous, duly served on the party and there must be an act of willful disobedience by the party.
52. In the instant case, I have keenly perused the orders that were issued and the application and affidavit filed by the Petitioners. The said application for contempt is dated 9th November 2021 for an alleged contempt committed after issuance of the orders on 2nd November 2021. However, save for repeatedly stating that the demolitions were done on 20th October 2021, being on mashujaa day, there was no specific mention of any date when the non-compliance was committed. For this court to cite the 1st Respondent for contempt, there ought to have been certainty as to when the acts of contempt were committed. An action committed before the issuance of the orders cannot have amounted to contempt of the said orders. While it may be an absurdity, its remedy cannot be under the pretext of the contempt application. In view of the foregoing, the Court declines to grant the orders sought in the Application dated 9th November 2021.

Issue No. IV

Remedies if any.

47. Having found that the respondents violated the petitioners’ constitutional rights, it follows that the 1st respondent is liable for such violation, even though it is a private person, as the Bill of Rights applies both vertically and horizontally. The state is also liable for the acts of the officers under the 2nd and 3rd respondent who used their statutory power, not to protect the marginalized in society, such as the petitioners, but to assist the 1st respondent to deprive the petitioners of even the little that they had.
48. The petitioners have prayed for an order of compensation of Ksh 150,000,000 Million. Articles 22 and 23 of *the Constitution* grants this Court authority to enforce and uphold the Bill of Rights in claims of infringements of rights, and to grant appropriate relief, including an order for compensation. *The Constitution* does not define the term compensation, and recourse is in this regard had to the definition in Black’s Law Dictionary Tenth Edition at page 343 which is the “payment of damages or any other



act that a court orders to be done by a person who has caused injury to another". The Petitioners in their Petition sought a declaration that as a result of the violation of their rights, they had suffered loss and damage, and compensation for the said breach and violation in terms of the losses suffered.

49. The South African Constitutional Court in *Ntanda Zeli Fose vs Minister of Safety and Security*, 1996 (2) BCLR 232 (W), acknowledged that compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*, as a distinct remedy and additional to remedies in private law for damages. Further, that the comparable common law measures of damages will be a useful guide in assessing the amount of compensation, which will depend on the facts and circumstances of each case. It is notable in this respect that comparative jurisprudence limits the award of general damages in constitutional cases to only proven damages and not presumed damages.
50. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.
51. In the instant Petition, the Petition sought an award for compensation for damages for Ksh 150,000,000. However, no evidence was led as to how the said figure was arrived at. The court was also not furnished with the details of the persons who were to be compensated the said amount and as such the same cannot be granted as prayed.
52. On the issue of costs, the Court has discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to Court. In the instant Petition, the Petitioners having partially succeeded in their claim, I will make an order that each party do bear their own costs of the Petition.

Disposition

47. In the end, the Amended Petition dated 28th October 2021 and the application dated 9th November 2021 are hereby disposed as follows:-
 - i. A declaration be and is hereby issued that the action of the 1st, 2nd and 3rd Respondents through their agents, servants, employees in demolishing the homes erected at Upendo II Village was unconstitutional and breached various laws and regulations.
 - ii. A declaration that the 1st, 2nd and 3rd Respondents violated the Petitioners rights under *the constitution* and specifically Articles 28, 29, 32, 40, 43, 47, 53, 54 and 57 of *the Constitution* of Kenya.
 - iii. That the Application dated 9th November 2021 is dismissed.
 - iv. That the rest of the prayers sought in the Amended Petition are declined.
 - v. Each party to bear their own costs of the proceedings.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MAY 2022

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Nyamogo for Dr. Orago for the Petitioners and Interested Party.



Mr. Suge for the 1st Respondent.

Mr. Motari for the 2nd,3rd and 5th Respondent.

N/A for the 4th Respondent.

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE

