



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CONSTITUTIONAL PETITION NO 75 OF 2011**

**GEORGE KIMANI MBUGUA**

**FELIX WACHIRA KIRIKO**

**MIRIAM ANYANGO MALLA** (suing as

officials of **AIRPORT NEW NEIBHOURS GROUP**..... **PEPTIONERS**

**VERSUS**

**MINISTRY OF ROADS**.....**1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL**.....**2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 13<sup>th</sup> June, 2012, I delivered judgment in this matter in which I found and directed as follows:

***73. In light of all the above matters, I find and hold as follows:***

- i. The petitioners did not have a right to property recognized under the Constitution in land parcel numbers 9042/130, 9042/131, 9042/132 and 9042/133.***
- ii. There was therefore no violation of the petitioners' right to property under Article 40 of the Constitution;***
- iii. The petitioners had received notice of the intended demolition of the houses constructed on the land earmarked for the Eastern By-pass;***
- iv. There was a violation of the petitioners' right to housing in the demolition that was carried out on the night of 20<sup>th</sup> November 2010 and the petitioners are entitled to compensation.***

***74. Article 23 (3) of the Constitution empowers the court to grant appropriate relief in matters brought under Article 22 of the Constitution. In this case, I will issue directions to give an opportunity to the state to correct the violation of the petitioners' right to housing and to meet its constitutional obligation to them as citizens of Kenya. I direct as follows:***

***(i) That the petitioners and the respondents do within a period of 6 months from the date of this Judgment negotiate reasonable compensation measures for the petitioners for the loss of their dwellings with a view to ensuring their access to housing.***

***(ii) That this matter be listed for mention before the Court within 6 months from today for further orders and directions.***

2. When the matter came up before me after the expiry of the said period on 4<sup>th</sup> February 2013, Counsel for the petitioners indicated that negotiation in terms of my direction had been unsuccessful as the respondents had insisted on filing an appeal against the said judgment. Consequently, he applied that the parties be allowed to file written submissions on damages to enable the court make a decision. I directed that the court would hear submissions from Counsel on the reasonable compensation measures for the petitioners in 30 days' time.
3. On 11<sup>th</sup> March 2013, I again gave the respondents more time, until the 16<sup>th</sup> of April 2013, to enable them consider once again what compensation measures they were willing to take in respect of the petitioners. On that date, Ms. Muchiri sought 14 more days to enable the respondents put in submissions, which I again granted.
4. When the matter came up next on 3<sup>rd</sup> May 2013, the respondents asked for an inventory of the persons who were resident on the road reserve at the time of the demolition, and I directed the petitioners to supply a clear inventory of the persons who were resident on the road reserve and adjourned the matter to the 27<sup>th</sup> of May 2013.
5. On this date, on the application of the respondents, I deferred the matter to the 1<sup>st</sup> of July 2013 to enable the respondents consider the inventory and other issues raised in the petitioners' affidavit dated 3<sup>rd</sup> May 2013. I also directed the respondents to supply the court and the petitioners with the plans and policies that it has for addressing this matter.
6. When the parties next appeared before me on the 1<sup>st</sup> of July 2013, Ms. Kamande indicated that the respondents were unable to come up with a resolution of the matter and asked the court to make a determination thereof. Both parties asked the court to rely on their respective written submissions, and Mr. Ombwayo for the petitioners asked the court to find that, in light of the fact that the respondents had not come up with a proposal for compensation for the petitioners, the traditional form of compensation, implying an award of monetary damages, would be the most expedient in the circumstances. This ruling is therefore in respect of the written submissions of Counsel for the parties pursuant to my judgment of 13<sup>th</sup> June 2012.
7. I must at the outset express a certain feeling of disappointment with the parties in this matter. With regard to the respondents, and despite my giving them very many opportunities, many times over the objection of the petitioners, they have failed to even indicate that they applied their mind at all to the responsibilities of the state in a matter such as this. On the part of the petitioners, their mind, unfortunately, is fixated on the 'traditional' form of compensation, as Counsel for the petitioners calls it. The respondents believe that they have no obligation to the petitioners and, despite my findings to the contrary, maintain obduracy against even considering what options there may be. The petitioners believe that an award of damages will resolve the issue for them.
8. My view of this matter is different. As I indicated in my judgment, I contemplated 'reasonable compensation measures' going over and above the well-trodden path of dishing out monetary compensation to those whose rights have been violated. As I see it, the new Constitution is about transformation of society. When it provides for social economic rights such as the right to housing, I believe it contemplates that the state and citizen will constructively engage in a manner that will enable them resolve the problems associated with the lack of the social rights and amenities for provision of such rights as housing, water, education, and health care.

9. In the present case, as I found in my judgment, the petitioners were not the owners of the subject property. They therefore could not maintain a claim for violation of the right to property. Similarly, they could not maintain a claim for violation of the right to fair administrative action, for I found as a fact that they had been given adequate notice to vacate the subject property, which they had failed to do.
10. In his submissions on the issue of compensation, Mr. Ombwayo has set out what he considers to be appropriate compensation for the petitioners. He takes the view that monetary compensation of Kenya Shillings 2,378,568.40, based on the value of a two bedroom apartment would be adequate compensation for each of the 41 petitioners. In the alternative, he claims a total of Kshs 120, 856, 507.83 for all the petitioners, based on bills of quantities and work sheets and plans drawn by a qualified quantity surveyor.
11. On their part, the respondents submit that they have engaged with various ministries and other stakeholders; that they have faced the challenge that Kenya has no legal framework for dealing with forced evictions; that the case of the petitioners cannot be dealt with in isolation as criteria for dealing with similar cases have to be set, and that the government has taken positive steps towards eliminating or reducing forced evictions.
12. They ask that in determining the amount of compensation to award, the court should disregard the claim of Kshs 120 million proposed by the petitioners as it is exaggerated and not reasonable; bear in mind that the suit land did not belong to the petitioners and it would open flood gates if the petitioners' demands were met as others would invade public land and demand compensation; consider that the government is taking positive steps towards realisation of social economic rights; that the petitioners are not living in the streets but have rented houses in the neighbourhood; and that the petitioners and other citizens have an obligation to obey notices and directives from the state.
13. In my view, the petitioners have considered this matter purely from a private law perspective under which damages are awarded for loss suffered. However they have overlooked the fact that in this case, the finding of the court was that they had no right to the property in question, and that they had been given adequate notice to vacate the subject premises. What the court recognised is that by evicting them violently, at night, the respondents violated their right to housing, which, as Lenaola J found in **Satrose Ayuma & Others –vs- Kenya Railways Retirement Benefits Scheme & Others High Court Petition No. 65 of 2010**, is closely linked with the issue of unfair evictions.
14. The respondent on its part seems to take the view that because the petitioners had no right to the property they occupied, it was in order for them to be evicted violently, despite the findings of the court to the contrary.
15. I am cognisant of the need, in dealing with matters such as the one presently before me, to require that the state begins to be conscious of its obligations towards its citizens, even those who may be unlawfully on public property. The wrongdoing on the part of the state is not the removal of the petitioners from the suit property per se, as they were in occupation of a public road and had disregarded the notice issued to them to vacate. The manner in which it carried out the removal of the petitioners from the subject premises is what attracts censure from this Court, as it failed to meet international guidelines on evictions, and thereby was a violation of the petitioners' rights. This is what the Court indicated entitles the petitioners to compensation.
16. I believe that the state could have used this matter, which involves a relatively small number of petitioners, to begin to put in place mechanisms and a template for meeting its obligations to citizens with regard to the right to housing. This is what the state has a constitutional obligation to do, and what it has committed itself to do in the National Housing Policy for Kenya, Sessional Paper No. 3 of July 2004, with regard to squatters and those in occupation of informal settlements.

17. Unfortunately, it appears to have closed its mind to taking any concrete action in the area of housing, confining itself, as is evident from its submissions in respect of the compensation aspect of this matter dated 28<sup>th</sup> June 2013, to the contention that there is legislation or pending legislation on the issue of land and forced evictions, and that there is no set criteria yet for compensating the petitioners or any other victim to ensure equal treatment for all.
18. I agree that legislation is in order and is necessary, as is criteria for compensation. But it is the state which must set the criteria, in accordance with the Constitution and the Housing Policy. The absence of a criteria, which it has an obligation to set, is no answer to the petitioners' claim. In the circumstances, I am left with no option but to make a monetary award to the petitioners.
19. In considering this matter, I am persuaded to follow the decision of Muchelule J in **Ibrahim Sangor Osman –vs- Minister of State for Provincial Administration and Internal Security & 3 Others, Embu HCCC No. 2 of 2011**. In the said case, the court ordered the respondents to pay each of the 1,123 petitioners Kshs 200,000, return them to the land they were evicted from, and construct houses for them.
20. In the present case, the petitioners had more than 6 months' notice to vacate the suit land, which is a road reserve set aside for the public purpose of constructing the Eastern By-pass. They are entitled to compensation, not for removal from the land or the physical structures which they had constructed on the subject land and which were demolished, but for violation of the right not to be violently deprived of their housing structures in circumstances that are in clear violation of the international guidelines on forced evictions.
21. I therefore make an award of Kenya Shillings Three Hundred Thousand (Kshs 300,000) to each of the petitioners, to be paid with interest from the date hereof until payment in full.
22. The petitioners shall also have the costs of this petition.

**Dated Delivered and Signed at Nairobi this 24<sup>th</sup> day of September 2013.**

**MUMBI NGUGI**

**JUDGE**

**Mr. Ombwayo instructed by the firm of Odawa Ombwayo & Ochich Advocates for the Petitioners.**

**Ms. Kamande, Litigation Counsel, instructed by the State Law Office, for the Respondents.**