



REPUBLIC OF KENYA



Kitale Industries Limited v County Government Of Nakuru & another (Environment & Land Petition 7 of 2019) [2022] KEELC 2909 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 7 OF 2019
FM NJOROGE, J
JUNE 28, 2022**

BETWEEN

KITALE INDUSTRIES LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF NAKURU RESPONDENT

AND

KENYA RAILWAYS CORPORATION INTERESTED PARTY

JUDGMENT

1. On June 6, 2019, the petitioner commenced the present action by lodging the petition dated May 31, 2019 which was amended on January 15, 2021 and which seeks the following orders:
 - a. A declaration that the petitioner’s fundamental rights to the protection of its property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached;
 - b. A declaration that the respondent acted inconsistently with and in breach of their powers, duties and obligations under the provisions of articles 10, 35, 47 and 50 of *the Constitution*.
 - c. An order prohibiting the respondent whether by itself or through its agents, servants or employees from interfering with the petitioner’s proprietary rights or quiet possession or enjoyment of the demised land;
 - d. A conservatory order in the form of an injunction be issued to restrain the respondent whether by itself or through its agents, servants or employees or howsoever else from interfering with the petitioner’s proprietary rights or its quiet possession or occupation of the property measuring 3.6 acres situate at Kenya Railways Corporation’s S.I.O.W yard in Nakuru and which is leased to the petitioner for a term of 15 years from July 30, 2007 (‘the demised premises’) or in any



other manner howsoever interfering with or from causing embarrassment to the petitioners by refusing its County Government services or renewing its or its group companies Single Business Licenses pending the hearing and determination of this petition.

- e. An award of Kshs. 536,993,889.60 as compensatory damages;
 - f. A further award of Compensatory damages for the values of parts and tools stolen from the Petitioner's aforesaid premise together with the value of the premises it has been disposed of.
 - g. The costs consequent upon this petition be paid and borne by the Respondent; and
 - h. All and other such orders or relief as this honorable court may deem just and fit to grant.
2. The petitioner is a limited liability company and the lessee from the Kenya Railways Corporation for a term of fifteen (15) years from 20/08/2007 and with an annual rent of Kshs. 2,800,000/= of property measuring 3.6 acres that is situated at the Kenya Railways Corporation's S.I.O.W yard in Nakuru. The suit property was to be used for milling, warehousing and ancillary facilities. The petitioner had been in possession of the property since the lease was formalized and registered and it had been waiting for Kenya Railways Corporation's approval to demolish the dilapidated buildings and then re-develop the property to enable it utilize the land as intended.
 3. The respondent developed interest in the suit land, intending to develop it for public infrastructure development and it notified the petitioner so in writing; it further notified the petitioner of its discussions with the Kenya Railways Corporation over the issue. Correspondence was then exchanged between the petitioner and the respondent. In some of the correspondence the petitioner perceived the respondent to be threatening to take the land whether the petitioner approved of it or not. The petitioner then proposed that the Kenya Railways Corporation should be involved in the discussions and it consequently wrote to Kenya Railways Corporation informing it of its engagement with the respondent. At a tripartite meeting held on January 22, 2019, it was agreed that Kenya Railways Corporation would provide an alternative suitable land to the petitioner and a fresh lease would be processed in its favour.
 4. The petitioner averred that in due course after these engagements had commenced, the respondent frustrated it by interfering with its quiet possession and has also refusing to renew the petitioner's single business license. The respondent also tried to unlawfully trespass onto the suit land and dumped lorry loads of murrum at the entrance of the property. The respondent also refused to renew the Single Business Permit for Mombasa Maize Millers Ltd, Nakuru Limited, its sister company.
 5. The petitioner averred that it was unreasonable for the respondent to infringe on their rights.
 6. According to the petitioner, the final blow came when, despite the interim injunction granted on June 24, 2019, the respondent trespassed onto and dispossessed it of the suit property and destroyed property thereon worth millions of shillings.
 7. The petitioner averred that under articles 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of *the Constitution*, it has the right of protection of its properties, right to fair administrative action, access to information and to a fair hearing. It stated that whereas the respondent has a duty to discharge certain county functions, it must do so while recognizing the petitioner's constitutional and legal rights, and that the respondent's actions are in violation of the provisions of *the Constitution* of Kenya 2010.
 8. The petitioner stated that the respondent remains liable for compensation to it for destruction, loss and damage arising out of its wrongful actions. The total loss incurred by the petitioner as a result of the actions of the respondent is, the value of parts and tools stolen from its premises and the value of the premises it has been in occupation of, estimated at Kshs. 536,993,889.60.



Responses to the Petition

9. In response to the petition, the respondent filed the sworn replying affidavit of Justine M. Nyaroo, Acting Director of Physical Planning and a Senior Planner in charge of Nakuru Eastland dated February 18, 2021.
10. He deposed that the instant application is an abuse of the court process; that Nakuru has inadequate parking space and the respondent had therefore embarked on a program to decongest the town by acquiring suitable land for the said purpose; that the respondent had identified the suit land as a suitable place to put up a modern bus park and approached the Interested Party to commence negotiations of acquiring the property; that the Interested Party confirmed that its board had approved the leasing of the property to the respondent upon successful negotiations between the respondent and the petitioner; that on January 22, 2019 they held negotiations where it was agreed that the Interested Party would provide alternative land for the relocation of the petitioner; that during the said meeting the petitioner was represented by five members; that on 25/01/2019, the respondent through a letter written by the Governor requested the managing director of the Interested Party to fast-track the process of acquiring land for the relocation of the Petitioner. He deposed that alternative land had been identified and shown to the petitioner for the purpose of its reallocation to it and the respondent did not have any objection to the petitioner's intended use of the property.
11. He reiterated that the instant petition is premature, calculated at tainting its reputation and interfering with its urban planning and development agenda; that the consultative meeting held on 4/04/2019 was preceded by a site visit to the proposed new relocation site that is situated off Ravine Road opposite the Nakuru Government Inspection Unit. He deposed that the petitioner has not demonstrated how the respondent has violated the provisions of article 10 and article 40 of *the Constitution* and neither has it demonstrated any breaches of the law or procedure which would entitle this court to intervene in the matter.
12. He deposed further that granting the orders sought by the petitioner would be discriminatory and negatively interfere with the progress of the already negotiated process and management of traffic within the Nakuru Central Business District, that the petitioner has not disclosed any cause of action against the respondent and that the entire suit should be struck out. He deposed that the respondent is a stranger to the petitioner's allegations that it trespassed onto the petitioner's property, and further stated that the respondent was not privy to any acts of destruction on the petitioner's property and any valuation arising there from; that the petitioner's claim has been overtaken by events given that all the occupants of the suit property were evicted from the suit land. The respondent then sought that the amended petition be dismissed with costs.
13. In reply to the petition, the Interested Party filed the sworn replying affidavit of Stanley Gitari, its Senior Legal Officer dated March 10, 2021. In that affidavit the deponent denied that the interested party caused any destruction of the petitioner's properties; that the petitioner suffered loss amounting to Kshs. 536,993,889.60 or that the interested party had in any way infringed the proprietary rights of the petitioner. In conclusion, he deposed that the amended petition ought to be dismissed with costs.

Submissions

14. The petitioner filed its submissions dated April 14, 2022 and filed on April 19, 2022. It gave a background of the matter and submitted that the respondent breached the order issued on 2/07/2019 and therefore sought that the court grants the declaratory relief sought in prayers (a) and (b) of the amended petition. It was submitted that the petitioner no longer pursues the reliefs sought in prayers (c) and (d) as per the decision of the court made on May 21, 2020.



15. On the issue of compensation, citing the case of *David Moranga Oyugi vs. County Government of Kisii & 4 others* [2022] eKLR and article 23(3) of *the Constitution*, the petitioner submitted that the court is entitled to grant general compensatory orders as sought in prayers (e), (f) and (h) of the amended petition. The petitioner submitted that it had the proprietary interest to the suit property known as S.I.O.W Yard Nakuru in respect of which it had a lease dated 25/09/2012. It submitted that pursuant to that lease, it had paid a stand premium of Kshs. 6,000,000.00 and had purchased the buildings there on for Kshs. 4,175,000.00.
16. In conclusion the petitioner prayed that the declaratory orders sought be granted and that it be awarded damages of Kshs. 10,175,000.00 and an additional sum of Kshs. 25,000,000/=.
17. On its part, the respondent filed its submissions dated May 16, 2022 on May 17, 2022 and gave a background of the petition and its response to the petition. It submitted that the only issue for determination is whether the petitioner is entitled to the orders sought. The respondent submitted that the petitioner has not demonstrated the manner in which the respondent has violated its constitutional rights to warrant the intervention of the court. It further submitted that the petitioner has not placed before the court any evidence to corroborate the existence of the alleged destruction of its property. The respondent relied on the case of *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR.
18. It was submitted that the respondent acted reasonably and within the law and that the petitioner has not demonstrated otherwise; that all the occupants of the Interested Party's land including the petitioner were evicted and as such their claim has been overtaken by events. It concluded its submissions by stating that the instant suit should be struck out as it is a frivolous and vexatious suit as was defined in the case of *Vivian Muia v Mzoori Limited* [2017] eKLR.
19. The interested party filed its submissions dated April 14, 2022 on the same date and gave a background of the matter before submitting that the legal burden of proving the destruction of the petitioner's property by the Interested Party lies with the petitioner pursuant to section 107 of the *Evidence Act*. It went on to submit that no evidence has been produced to show that it destroyed the petitioner's property. It also submitted that it had given the petitioner a lease of fifteen years for the premises and had received rent and it therefore had no interest in the land.
20. The interested party further submitted that special damages must be specifically pleaded and strictly proved at trial. It relied on the case of *Peter Mark Gershom Ouma v Nairobi City Council* [1976] eKLR among other cases and submitted that the claim for special damages has not been specifically pleaded and strictly proved. It concluded its submissions by praying that the petition be dismissed with costs to it.

Analysis and Determination

21. After considering the amended petition, the replying affidavits and the submissions, the following issues arise for determination:
 - a. Whether this petition meets the threshold required of a constitutional petition;
 - b. Whether the petitioner's rights were violated;
 - c. Whether the reliefs sought should be granted.

The issues are discussed herein below.

Whether this petition meets the threshold required of a constitutional petition.



22. The court in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR stated as follows:
- “...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
23. The Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR also stated as follows:
- “(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”
24. The court in the case of *Godfrey Paul Olutoyi & another vs Habil Olaka & another* [2018] eKLR stated that where there are other remedies readily available to a claimant, the constitutional mandate of the court should not be invoked. It was held as follows in that case:
- “65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.”
25. The case of the petitioner in this matter is that it leased 3.6 acres of the Interested Party’s S.I.O.W yard in Nakuru for a term of fifteen years starting from July 20, 2007. During the subsistence of the said lease, the respondent developed an interest in the land, and informed the petitioner of its intention to acquire the suit property and convert it to a bus park. The petitioner’s officials met with the respondent and the interested party and they agreed that the petitioner would move out of the suit property and be given alternative land. The petitioner also stated that soon thereafter the respondent tried to trespass onto the suit property and that eventually, despite the interim orders of injunction granted by the court on June 24, 2019 and issued on July 2, 2019, the respondent evicted the petitioner and destroyed its properties, thereby occasioning the petitioner loss and damage estimated at Kshs. 536,993,889.60 which sum the petitioner claims.



26. From the foregoing, it is evident that the petitioner is in essence challenging its eviction from the suit property by the respondent on the basis that it had a subsisting lease with the interested party and that it is also seeking for compensation for the alleged loss and damage arising from its eviction.
27. Constitutional petitions are normally determined on the basis of affidavit evidence. It is the case that normally, the only issue arising in constitutional petitions is whether the conduct of the respondent amounted to a violation or threat of violation of a petitioner's constitutional rights. Factual matters are normally deemed as settled and capable of being conveyed to the court in affidavits and oral evidence is usually excluded save in a very limited number of cases.
28. It would require evidence in the current dispute to establish, for example, if it was the respondent who blocked the way into the suit premises, or that it demolished the buildings on the suit premises (the petition speaks of the 2nd respondent). Evidence of the said interference with possession and of the worth of the alleged damage occasioned to the petitioner can only be brought to court in the normal manner required in a civil suit and subjected to verification, including by way of cross-examination of the expert witnesses that may be called at the hearing.
29. It is this court's view that the issues raised by the petitioner are not constitutional in nature and are therefore not within the court's constitutional jurisdiction; they can be dealt with in an ordinary civil suit commenced by way of plaint.
30. Further as pointed out by the respondent, this court notes that the petition does not plead with specificity which provisions of *the constitution* were breached and how they have been violated. The petitioner only states that by virtue of the constitutional and statutory provisions as well as articles 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of *the Constitution*, it has a right to the protection of its property and a right to protection from arbitrary deprivation thereof. The closest the petitioner came to realizing proper pleading worthy of a constitutional petition was in paragraph 17 of the petition; however even the allegations contained in that paragraph are, in the opinion of this court, general and do not provide the court any foothold for the granting of any constitutional relief to the petitioner, for the reason that the specific actions complained of as invoking the provisions of article 40 of *the Constitution* are not pleaded. This blanket approach to rights and threat to their infringement or to their actual violation or does not in my view meet the specificity that is required under the rule in the Court of Appeal case of *Anarita Karimi v Republic* (*supra*).
31. In conclusion, this court finds that as its conclusion is that the petition does not therefore meet the required constitutional threshold required of a constitutional petition, there is therefore no need to subject to analysis for merit the rest of the issues listed for determination. Consequently, the amended petition dated 15/1/2021 is hereby dismissed with costs to the respondent and the interested party.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

