



Musa & another (Suing on their own behalf and on behalf of two hundred and two affected residents of Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub-county in Kisumu County) v Kenya Railways Corporation & 2 others (Constitutional Petition E020 of 2021) [2022] KEELC 2524 (KLR) (15 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CONSTITUTIONAL PETITION E020 OF 2021**

A OMBWAYO, J

JULY 15, 2022

**IN THE MATTER OF A CLASS ACTION LAWSUIT IN RESPECT
OF CIVIL RIGHTS CLAIM OVER DEMOLITION OF PRIVATE
PROPERTY BY KENYA RAILWAYS IN MUHORONI SUBCOUNTY**

IN KISUMU COUNTY

AND

**IN THE MATTER OF ARTICLES 10,22(1) &(2),23(3) (A),(C), (E),&(F),25(A),26,27(2),
(4) & (6),28,29,39,40,43,47,56 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLE 13 OF THE DECLARATION OF RIGHTS AND DUTIES
OF STATES, ARTICLE 27 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES,
RIGHT TO DIGNITY UNDER THE INTERNATIONAL CONVENTION ON CIVIL
AND POLITICAL RIGHTS (ICCPR) AND THE RIGHT TO HOUSING UNDER THE
INTERNATIONAL COVENANT OF ECONOMIC SOCIAL AND CULTURAL RIGHTS**

BETWEEN

SOLOMON MUSA 1ST PETITIONER

DANIEL OTIENO ARWA 2ND PETITIONER

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF TWO HUNDRED
AND TWO AFFECTED RESIDENTS OF SHAURIMOYO, SWAHILI VILLAGE
AND BONDENI INFORMAL SETTLEMENTS OF MUHORONI SUB-COUNTY
IN KISUMU COUNTY**

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT



Procedural protections which should be applied in relation to forced evictions

The petitioners were affected residents of Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub-County in Kisumu County and filed the instant suit as a result of destruction of their property. The court in this case reiterated the procedural protections which should be applied in relation to forced evictions.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - right to property - right to housing - claim that the petitioners were forcefully evicted without notice and their houses demolished - what were the procedural protections which should be applied in relation to forced evictions -, articles 40 and 43.

Brief facts

The petitioners were affected residents of Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub-County in Kisumu County and filed the instant suit as a result of destruction of their property occasioned by the respondents on February 6, 2021 from about 2.00pm to 7.00pm in a multi-agency operation that involved earth movers and over 50 police officers. The petitioners averred that the suit parcels formed part of the KISIP which was a multi-agency initiative that engaged in the streamlining of the land tenure in informal settlements by enhancing tenure security, settlement level planning, infrastructure services provision and planning for future urban growth of informal settlements and to that end had processed titles for Shaurimoyo, Bondeni and Swahili Villages in Muhoroni Sub County.

It was also the petitioners' case that the Part Development Plans (PDPs) were duly gazetted and the Kenya Railways (1st respondent) did not raise objections to the process hence titles were processed. The 1st respondent alleged part of the upgrade done by KISIP took place within the railway station which was an area within its authority and control. The 1st respondent claimed that it was not consulted neither were its views sought at the time the upgrade was being done and that KISIP did not have authority to allocate railway land or land within its station area and therefore it challenged the validity of the PDPs and the gazette notices referred by the petitioners. The 1st respondent further claimed that the demolitions were done lawfully and after the relevant notices were served on the petitioners.

The petitioners sought for among others, a declaration that the respondents had jointly and severally been responsible for the denial/violation/infringement of the petitioner's rights and fundamental rights in the bill of rights and that the 1st respondent engages the petitioners and all the project affected persons in Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County in crafting a relocation action plan.

Issues

What were the procedural protections which should be applied in relation to forced evictions?

Held

1. The notices issued by the 1st respondent were issued in 2019. There was no notice from the 1st respondent indicating that it was to carry out evictions on February 6, 2021. The petitioners' right to housing was violated as their houses were demolished without considering their welfare. By destroying the petitioners' houses, churches and schools, the respondent denied the petitioners socio-economic and cultural rights under article 43 of (Constitution).
2. Pursuant to the advertisement and the gazette notices relating to the PDPs, the same were notices of completion of PDPs for the settlement schemes in Muhoroni Sub County and the purpose of the notices was to notify the public that any interested persons who wished to make any representation or objection to the PDPs to do so in writing. The 1st respondent did not raise any objection in relation to the process of preparation



of the PDPs yet the 1st respondent in paragraph 11 of the replying affidavit stated that it was never consulted by KISIP during upgrading of the settlement schemes.

3. The 1st respondent was given an opportunity to challenge the PDPs but failed to do so and if the 1st respondent was in full support of KISIP, it ought to have raised objections towards the upgrading of the informal settlement schemes in Muhoroni Sub County.

4. The procedural protections which should be applied in relation to forced evictions included;

1. an opportunity for genuine consultation with those affected;
2. adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
3. information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing was to be used, to be made available in reasonable time to all those affected;
4. especially where groups of people were involved, government officials or their representatives to be present during an eviction;
5. all persons carrying out the eviction to be properly identified;
6. evictions not to take place in particularly bad weather or at night unless the affected persons consented otherwise;
7. provision of legal remedies; and
8. provision, where possible, of legal aid to persons who were in need of it to seek redress from the courts.

5. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected were unable to provide for themselves, the State party had to take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case could be, was available.

6. Consultations were never done as the evictions were unlawful and no relocation action plan was made by the respondents to ensure that the residents of Shaurimoyo, Bondeni and Swahili Villages were resettled or compensated before the evictions were done.

7. The petitioners were not issued with notice prior to the demolitions and the notice being relied on by the 1st respondent was issued in 2019 and not prior to the demolitions of February 6, 2021. The residents of Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County were aware that the relevant Government stakeholders through KISIP were upgrading and the PDPs were availed to them. However, the demolitions were done unlawfully as it had been clearly established that the demolitions breached their fundamental rights and freedoms.

8. It was not clear whether the respondents were present during the demolitions as the petitioners in paragraph 28 of their supporting affidavit stated that the demolitions were carried out using earthmovers and the demolitions were effected by policemen. From the evidence on record, the persons carrying out the demolitions were identified as the 1st respondent in paragraph 14 of its replying affidavit stated that the demolitions were a multi-agency operation that involved the respondents in order to reclaim all railway operational area that had been encroached.

9. The evictions were carried out from 2.00pm to 7.00pm without consent of the affected persons leaving them homeless. The affected persons were not given an opportunity to seek redress from the courts neither were they compensated for the loss suffered.

10. The petitioners had relied on a computer-generated and handwritten itemization of the assets destroyed and their monetary value without any evidence to prove ownership of the documents or their value. The petitioners had not produced any receipts, invoices or any bank statements to prove that they suffered loss as a result of the demolitions. General Damages ought to be reasonable.

Petition partly allowed.



Orders

- i. *The court found and declared that the respondents had jointly and severally been responsible for the denial/violation/infringement of the petitioner's rights and fundamental rights in the bill of rights under articles 10(2) (b),25,26,27(1),28,29(f),39,40,43(1)(f),47 and 56 of the .*
- ii. *The 1st respondent to engage the petitioners and all the project affected persons in Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County in crafting a relocation action plan.*
- iii. *Each of the 206 petitioners was entitled to Kshs. 100,000 creating an aggregate of Kshs. 20,600,000 as general damages for breaches of their fundamental rights.*
- iv. *Costs of the petition to be borne by the respondents.*

Citations

Cases

1. Anarita Karima Njeru vs the Republic (No. 1) ((1976-80) 1 KLR 1272) — Explained
2. Chemey Investment Limited v Attorney General, Permanent Secretary Ministry of Health & Ethics & Anti-Corruption Commission (Civil Appeal 349 of 2012; [2018] KECA 863 (KLR)) — Explained
3. Edward Akong'o Oyugi, Kamoji Wachira & Joseph Otieno Malo v Attorney General (Constitutional Petition 441 of 2015; [2019] KEHC 10211 (KLR)) — Explained
4. Gitobu Imanyara, Njehu Gatabaki & Bedan Mbugua v Attorney General (Civil Appeal 98 of 2014; [2016] KECA 557 (KLR)) — Explained
5. Ibrahim Sangor Osman vs. Minister of State for Provincial Administration and Internal Security ([2011] eKLR) — Explained
6. Jimmy Gichuki Kiago & Michael Nato Mukhebi v Transitional Authority, Innocent Etyang, Reuben Malisha, Peter Khaemba, Christopher Gekonge, Dennis Arumba, Maurice Murei & County Government of Trans-Nzoia (Land Case 2 of 2019; [2019] KEELC 4738 (KLR)) — Explained
7. Kariithi & another v Attorney General & another (Constitutional Petition 30 of 2013; [2021] KEHC 308 (KLR)) — Explained
8. Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018; [2021] KESC 34 (KLR)) — Explained
9. Zipporah Seroney, Margaret Chepkosgei, Rose Jemutai, Florence Chepchirchir Seroney, David Kipkemboi Seroney & Christine Chekorir Seroney v Attorney General (Constitutional Petition 500 of 2013; [2020] KEHC 7072 (KLR)) — Explained
10. Irene Grootboom and Others v The Government of the Republic of South Africa and Others ((2001) (1) SA 46) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 10(2)(b); 25; 26; 27(1); 28; 29(f); 39; 40(6); 43(1)(f); 47; 56 — Interpreted
2. Kenya Railways Corporation Act — Section 16(3) — Interpreted

Advocates

None mentioned

JUDGMENT

Brief facts

1. The petitioners herein *vide* their petition dated September 3, 2021 and filed in court on September 7, 2021 is seeking the following orders;



1. That this court finds and so declares that the respondents have jointly and severally been responsible for the denial/violation/infringement of the petitioner's rights and fundamental rights in the bill of rights under articles 10(2)(b), 25, 26, 27(1), 28, 29(f), 39, 40, 43(1)(f), 47 and 56 of the Constitution.
 2. That the 1st respondent engages the petitioners and all the Project Affected Persons in Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County in crafting a Relocation Action Plan.
 3. That the petitioners and all the project affected persons be entitled to compensation for breach of their fundamental rights in the bill of rights.
 4. Damages.
 5. Costs of the petition.
2. The petition was filed together with a notice of motion application where the petitioners sought for the following orders:
 1. That this application be certified as urgent and deserving to be heard ex parte at first instance.
 2. That this court be pleased to certify this petition as urgent and deserving to be heard on a priority basis and a date be given for directions before the judge.
 3. Costs.
 3. The application dated September 13, 2021 was placed before me and the same was certified urgent. I directed that the respondents to file and serve a reply to the petition within 21 days, the petition be prioritized for hearing, the petitioners to file a reply with submission within 21 days of service, the respondents to file and serve submission within 21 days of service and parties to highlight submission on November 16, 2021.

Petitioners' Case

4. It is the petitioners' case that they have known these lands in Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub-County in Kisumu County as their homes either as land parcel owners, owners of structures of business premises and tenants and the same have a historical backing. That the petitioners grandparents were employees of 13 settlers who owned most of the big farm lands within Muhoroni Division during the precolonial days and more specifically Mr Magaret, Mr Spearaw, Mr Elan, Messrs Orga and Ross, Mr Matwere, Mr Tommy, Mr Adino and Major Jim, Major Sedi, Brigadier Gorge Martin, Mr Oera and Brigadier Katrimer.
5. It was stated that the settlers eventually surrendered their lands to the Kenyan Government after independence and they composed part of the settlement schemes which were parcels sold or allocated to new owners who evicted the Petitioners grandparents who were forced to be squatters in government lands specifically referred to as Special Purpose Lands which included Shaurimoyo, Bondeni and Majengo in Muhoroni in a resettlement process that was spearheaded in the 1970s by the local chiefs.
6. That the current petitioners and project affected persons are part of descendants of the said squatters as well as their tenants and persons who conducted businesses on the suit parcels who have for all the years resided in these parcels through the said informal arrangements until in 2017 when the World Bank through the Government of Kenya initiated the KISIP project whose principle objective was to formalize their land holding regime.



7. It was the petitioners case that the suit parcels formed part of the KISIP which is a multi-agency initiative that has brought together the World Bank, the AFD,SIDA and the Ministry of Transport, Infrastructure ,Housing and Urban Development that is engaged in the streamlining of the land tenure in informal settlements by enhancing tenure security, settlement level planning, infrastructure services provision and planning for future urban growth to prevent the growth of informal settlements and to this end has processed titles for Shaurimoyo , Bondeni and Swahili villages in Muhoroni Sub County.
8. That the tenure regularization process as envisaged by KISIP has been participatory which has led to the preparation and eventual crafting of Part Development Plans (PDPs) in respect of the Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County a position that has also been confirmed by the Principal Secretary for the State Department for Housing and Urban Development in a public document being an affidavit filed in Kisumu ELCJR/E002/2021.
9. The petitioners have averred that the respective PDPs were duly gazetted and it is important to note that at no time did Kenya Railways Corporation raise objections to the process thereby leading to the ongoing process of preparation of titles in respect of all the plots within the wider Shaurimoyo, Shauriyako, Bondeni and Swahili villages in Muhoroni Sub County.
10. The petitioners further averred that the said villages are captured within the uncontested PDPs which essentially defines the plan for Muhoroni Township which as per section 24 of the Physical Planning Act can be prepared in respect of government , trust and private land and more specifically as per the [Constitution 2010](#), the same can be prepared in respect of private, public and community land goes to give sanctity to the Petitioners' parcels which are 150 meters from the railway station with the railway go down and a road strategically located between the station and the petitioners' parcels.
11. The petitioners alleged that of the 206 affected persons, 13 are plot owners within Shaurimoyo Settlement Scheme that is plot numbers 1021, 1022, 1023, 1046, 1149, 1150, 1151, 1160, 1161, 1162, 1163, 1224 and 1225, nine are from Bondeni Settlement Scheme while eight are from Swahili Settlement Scheme which parcels are those earmarked by KISIP for purposes of preparation of title deeds for the beneficiaries. That they are aware that the Nakuru-Kisumu railway line was once bubbling with life and activity in the 1990s and for that reason they have always kept the requisite meter distance from the rail line as was delineated during the adjudication process and is captured in the land registry in respect of the petitioners who have titles to their lands.
12. That the respondents have initiated an upgrade through refurbishment of the old rail network from Nakuru to Kisumu which has been in existence for more than a century and is expected to connect to the recently refurbished Kshs. 3 billion Kisumu Port which will enable ferrying of cargo and passengers to Uganda, Rwanda, Burundi, and Democratic Republic of Congo on ships via Lake. That the overall idea of the respondent is to achieve seamless train services, linking the newly built SGR line and the refurbished meter gauge track which idea is appreciated by the Petitioners as being of public interest as the same would not only revive passenger transport which the applicants are nostalgic about but also lead to the rise in economic activity of the Muhoroni Sub County owing to the opening up of the regional markets through the Kisumu Port.
13. The petitioners alleged that on February 6, 2021 at about 2.00pm till 7.00pm at night, the respondent accompanied and assisted by 50 police officers raided and destroyed homes and businesses belonging to about 206 persons specifically residents of Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County. The said demolition which was being carried out using earthmovers was done without any notice and effected by policemen who ensured that homes, stalls and hotels were destroyed notwithstanding that the said parcels fell outside the 30m distance from the railway line.



14. The petitioners further alleged that other than the destruction of homes, the Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County area defined as the Informal Settlement also experienced complete wiping out of small-scale traders' stalls and wares which were strewn all over thereby subjecting this category of persons to poverty and financial strain. That in execution of the KISIP project whose object is the regularization of ownership through the securing of respective titles, the numerous affected persons within the wider Shaurimoyo, Shauriyako, Bondeni and Swahili villages of Muhoroni Sub County had been issued with parcel numbers in respect of their respective plots as enumerated in the list generated by KISIP.
15. The petitioners experienced wanton destruction of their houses, structures, items, business premises as well as public amenities such as HCTA Church, the Muhoroni Farmers' Cooperative Plant as well as the Toti Centre Pre-Unit School which accommodated 100 children and was reduced to rubble particulars of which the Petitioners have already highlighted. That as a result of the demolition, the Petitioners put up makeshift mabati and polyethene structures while others sought refuge in churches and other places of worship where they lived in a dilapidated conditions as per the photographs on record.
16. It was the petitioners case that the destruction occasioned by the respondents as against the petitioners' properties was wanton in which case each of the petitioners have particularized the nature of specific financial loss it incurred which on aggregate adds up to a total of Kshs 200,156,324/= which tabulation is well captured in the figures enumerated in the authorities given by the petitioners. That in arriving at the figure of Kshs 200,156,324/=, the petitioners engaged the services of a professional valuer one Mr Luke Madande for purposes of carrying out inventories and moderation of the specifics of the items lost or otherwise destroyed as a result of the respondents' unwarranted actions.
17. The petitioners sought legal advise through various law firms but were prohibited owing to the high level fee threshold and added to the fact that majority of the petitioners are low income earners hence the delay but after a further threat of early August was when the 1st respondent officers sought to fence off the disputed lands, the petitioners instructed their counsel on record to institute this petition. That the respondents have been in specific breaches of both constitutional and statutory provisions.
18. The petitioners filed a further affidavit on November 17, 2021 where Solomon Musa deposed and stated that the 2nd respondent is a department in the Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works in which the 1st respondent is one of the institutions and which operates under the mission of provision of efficient, safe and integrated transport systems, robust maritime economy, built environment and urban development for sustainable development. That the 1st respondent is an institution under the State Department of Transport and is mandated to oversee development of the Railway infrastructure, monitor and regulate the performance of the concessionaire (Rift Valley Railway) and also manage non-concessional assets in addition to managing the Railway Training School.
19. He stated that it is laughable and unbelievable that the 1st respondent can purport to question the KISIP project that is mooted, driven and implemented by its parent Ministry. That in as much as it appreciates the creation of PDP and Gazette Notices in respect of Shaurimoyo, Bondeni and Swahili Settlement Schemes the much steps it has taken is to challenge the same through affidavit evidence and not as requisite in law.
20. That the petitioners were not served with any notices and in any case the parcels that they occupied were vouched for by the 1st respondents parent Ministry through the 2nd respondent. He further stated that the 1st respondent's affidavit seems to suggest lack of synergy and therefore unpredictability in



government which is dangerous as the citizens are left confused as to the resultant state of anarchy that such an eventuality would occasion.

1st Respondent's Case

21. The 1st respondent herein filed its replying affidavit on November 16, 2021 where Bernadette Ndege a Senior Geographic Information System (GIS) Technician duly authorized by the 1st respondent swore an affidavit November 15, 2021.
22. She stated that the 1st respondent has no knowledge of the facts set out in paragraph 4-7 of the 1st supporting affidavit. That it is not in dispute that the State Department for Housing and Urban Development runs different programmes and projects to facilitate access to adequate housing and related infrastructure services across the country of Kenya and among these projects is a multi-agency initiative known as KISIP wherein the issues raised in the petition arise.
23. It was the 1st respondents case that in Muhoroni Sub County, it is in control of, maintains and operates operational area which is a combination of the railway corridor and the railway station and/or marshaling and the railway corridor reserve. She stated that she is aware that the physical pillars ear-marking the 1st respondent's land and its extent are very big pillars and conspicuous and cannot therefore be easily missed by any person walking around the property area.
24. It was stated that while the 1st respondent has no issue with KISIP and in is full support of the noble initiative that the project represents, the 1st respondent takes issue with the fact that the upgrading project by KISIP undertook in Muhoroni Sub County and specifically in relation to the Shaurimoyo, Bondeni and Swahili Settlement Scheme, part of the upgrade took place within the railway station which is an area within the authority and control of the 1st respondent.
25. That the 1st respondent has never consulted nor were its views sought at the time that the upgrade was ongoing and it was therefore unaware of the upgrade process. That KISIP does not have any authority to allocate Railway land within the 1st respondent's station area as it did in this case and therefore the 1st respondent challenges the validity of the PDPs and the Gazette Notices referred to by the petitioners in respect of the said plots with specific reference to the impugned area falling within the 1st respondent's station area.
26. It was further stated that the 1st respondent is the sole state firm mandated in Kenya to provide rail transport and in preparation of the nationwide revitalization program, members of the public occupying spaces reserved for railway operations were notified to seek alternatives in order to provide a safe corridor for railway operations. That in respect of the demolitions of February 6, 2021, the demolitions were done lawfully and after the notices were served on the petitioners in order to reclaim all railway operational area that had been encroached.
27. It was stated that when public land is to be allocated, there must be consultation and in the present case consultation ought to have been done with the 1st respondent and the land acquired for public purpose cannot be alienated, transferred or used in other way than for the set public purpose. That the 1st respondent has not surrendered, given nor relinquished any right in any of its foregoing properties in Muhoroni Sub County and therefore any alienation of the same by any institution ought to be done or ought to have been done upon consultation and approval by the 1st respondent which is not the case in the present circumstances.
28. The 1st respondent further stated that in the protection of fundamental rights and freedoms of the petitioners as sought in the present petition, this court is called upon to balance the constitutional rights of the petitioners as against the constitutional rights of the 1st respondent herein whose right



is being deprived of the use of its land. That the applicant's application is not merited and should be dismissed as against the 1st respondent with costs.

2nd and 3rd Respondent's Case

29. The 2nd and 3rd respondent filed grounds of opposition on November 9, 2021 that the petition lacks merit and is an abuse of the court process, that there is grave misrepresentation of facts in the petition, that the petition is scandalous, frivolous and vexatious and the petition may embarrass or delay justice for the 2nd and 3rd respondents.
30. The 2nd and 3rd respondents therefore prayed that the petition be dismissed with costs.

Petitioner's Submissions

31. The petitioners filed their submissions on November 17, 2021 and stated that the respondents went against the established law on forced evictions and demolitions as was held in the case of the Supreme Court in Nairobi Petition 3 of 2018- *Mitu Bell Welfare Society v Kenya Airports Authority & 2 others*, against its enabling statute that is section 16(3) of the *Kenya Railways Corporation Act* cap 397 Laws of Kenya and against the set norm as carried out by the 1st respondent during the Kibera- Mukuru Kwa Njenga phase of the Standard Gauge Railway(SGR) where after a process of public participation it secured funds to enable it relocate and resettle the squatters occupying the rail reserve in a bid to enhance the safety of rail transport and minimize loss of lives that may arise from the rail accidents within the densely populated Kibera and Mukuru slums in Nairobi.
33. That the 1st respondent in handling the Kibera-Mukuru Kwa Njenga phase, of the SGR in 2010, engaged the project affected persons in the densely populated Kibera and Mukuru slums in Nairobi in a public participation process complete with a relocation action plan and compensation. Reliance was placed in the case of Nairobi Constitutional Petition 239 of 2014- *Kepha Omondi Onjuro & others v AG, Kenya Railways & 7 others* where the court upheld the position by the Kenya Railways that it had complied with the requisite threshold before forced evictions and demolitions in the Kibera Mukuru Kwa Njenga slums.
34. It was submitted that the petitioners have established their legitimate claim to the suit properties in view of the tenure regularization process envisaged by (KISIP) which has been participatory and has led to the preparation and eventual crafting of the PDPs in respect of the Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County a position that has also been confirmed by the Principal Secretary for the State Department for Housing and Urban Development in a public document hence validating their proprietary interest under article 40 of the *Constitution* .
35. It was stated that even if the petitioners were illegal squatters in public land who had erected shelter and businesses therein, they would still accrue the right to housing under article 43 of the *Constitution* pursuant to the case of Nairobi Petition 3 of 2018- *Mitu Bell Welfare Society vs Kenya Airports Authority & 2 others*. That in as much as the petitioners and the project affected parties may have registered rights in respect to the said Properties that is not in itself a basis for securing of the orders sought as the same would still suffice even if they were illegal squatters in public land who had erected shelter and businesses therein hence accruing the right to housing under article 43 of the *Constitution*.
36. The petitioners stated in their submissions that to the extent that the evictions were carried out without notice and at night the same can therefore be adjudged to be unreasonable , unconscionable and unconstitutional and the said evictions were not carried out in accordance with the United Guidelines on Evictions as issued by the United Nations Office of the High Commissioner for Human Rights in General Comment No 7. It was submitted that the evictions went against the positive obligations



imposed upon the state by article 43 of the Constitution to ensure access by its citizens to socio economic rights, whose realization is progressive and dependent upon the availability of resources and the court should adopt the Supreme Court's upholding of the High Court decisions reinforcing the South African case of Irene Grootboom and others v The Government of the Republic of South Africa and others (2001) (1) SA 46.

38. The petitioners submitted that the forced evictions cum demolitions without notice or otherwise alternative accommodation amounted to a violation of the right to housing and other social economic rights which are protected under article 43, 21 and 10 of the Constitution. That a violation of article 43 amounts to a contemporaneous violation of the civil and political rights under articles 26,27 28, 29 and 47 of the Constitution. The respondents failed in their constitutional obligation to protect children in accordance with article 10 on the National Values and Principles and articles 53 as well as school going children whose learning cycle was tampered with as well as elderly women and widows whose homes were destroyed.
39. That the respondents must identify the affected persons through a rigorous mapping process and organize a proper relocation action plan through public participation involving all the project affected persons whose parcels about the Nakuru -Kisumu railway line. That compensation must be identified in the nature that would be adequate to allow for the project affected persons relocation and resettlement after ascertaining the value of the interests and the proposed alternative relocation areas.
40. It was further submitted that the project affected persons be granted just and appropriate remedy in the form of damages for the Constitutional violations in a way that will vindicate their rights and freedoms. That this court should consider the case of Supreme Court of Canada in Doucet-Boudreau v Nova Scotia (Minister of Education),2003 SCC 62 while assessing the damages. That the special damages of Kshs 190,746 639/= and general damages for the breaches in the fundamental rights in the bill of rights assessed at Kshs 100,000 for each of the 206 petitioners creating an aggregate of Kshs 20,600,000/=. That petitioners also prayed for costs.

1st Respondent's Submissions.

41. The 1st respondent herein filed its submissions on March 1, 2022. The following issues were raised for determination:

a) Whether there has been violation of any of the petitioner's rights by the 1st respondent.

42. It was submitted that the petitioners save for the generalities on alleged violation of their rights by the respondents in the petition, they have not stated with any degree of precision, the particulars of the alleged violations committed by the 1st respondent against them and which would in turn invoke the powers of this court for a declaration of the alleged violations and compensation for the same. Reliance was placed in the case of Anarita Karima Njeru v the Republic (No 1) (1976-80) 1 KLR 1272.
43. The 1st respondent submitted that it has not violated any of the petitioners rights as alleged in the petition instead it is the petitioners who violated its right to property by encroaching on land specifically reserved for railway use and attendant purposes as provided for under article 40(6) of the Constitution of Kenya ,2010.That apart from the submissions made by the petitioners to the effect that the 1st respondent conducted the demolitions of February 6, 2021 on its own without any notice , the 1st respondent submitted that the said demolitions were as a result of a multi-agency operation and did not just involve the 1strespondent and that the demolitions were done lawfully and after the relevant notices were served on the petitioners in order to reclaim all railway operational area that had been encroached.



44. That notices were issued by the 1st respondent to the effect that illegal occupants should vacate its land and also putting them on notice of demolitions of all illegal structures built on Railway Reserve. It was the 1st respondent's submission that the petitioners have not challenged in their submissions the notices exhibited by the 1st respondent's in its replying affidavit. That some of the land parcels mentioned at page 2 of the petitioners submissions which relate to the petitioners land fall within the 1st respondent's land as shown at page 4 of the 1st respondent's replying affidavit which shows that the 1st respondent's pillar f the railway reserve and the therefore the petitioners cannot claim property rights over land reserved for the use and occupation of the 1st respondent. Reliance was placed in the case of *Jimmy Gichuki Kiago & another v Transitional Authority & 7 others* (2019) eKLR.
45. It was submitted that there can be no place in law where the petitioners can benefit from allocation of portions of land set apart for a public purpose in the case of railway use and when public land is to be allocated, there must be consultation with the public body concerned .That the submissions of the petitioners to the effect that the 1st respondent neither lodged any objections against the PDPs nor moved to have the Gazette Notices quashed cannot be sustained for the reason that the 1st respondent had no notice of the entire process. The 1st respondent relied in the case of *Moses Okatch Owuor & another v Attorney General & another*, *Kenya Anti-Corruption Commission v Frann Investments Limited & 6 others* [2020] eKLR and *Chemey Investment Limited v Attorney General & 2 others* (2018) eKLR.
46. The 1st respondent submitted that it is trite law that in the protection of fundamental rights and freedoms of the petitioners as sought in the petition, this court is called upon to balance the constitutional rights of the 1st respondent whose right is being deprived of the use of its land.

b) Whether the petitioners are entitled to an award of damages sought in the petition.

47. The 1st respondent submitted that the petitioners have not specifically proved special damages as they have failed to prove any of the losses they allege to have suffered .That there are no receipts , invoices or even any bank statements of whatever nature to support the alleged losses that they have suffered .Reliance was placed in the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and the case of *Kariithi & another v Attorney General & another* (Constitutional Petition 30 of 2013) (2021) KEHC 308 (KLR) (23 November 2021) (Judgment) .
48. That the petitioners have relied on a computer-generated and handwritten itemization of the alleged assets destroyed and their monetary value without any iota of evidence to prove ownership of the said documents or even their value as alleged.
49. On general damages, it was stated that the petitioners have not submitted on what basis they seek an award of Kshs 100,000/= as no comparative jurisprudence has been cited to support this prayer contrary to the well-established legal principle that comparable measure of damages is a useful guide for the court. The 1st respondent therefore relied in the case of *Edward Akong'o Oyugi & 2 others v Attorney General* (2019) eKLR and submitted that the Petitioners should not be awarded general damages.
50. The 1st respondent further submitted that the petitioners parcels fall within the railway area and notices had been issued to vacate which the petitioners did not honour and it was unaware and it was not consulted during the process leading up to the current processing of titles in favour of the petitioners and was unable to raise any objections to the process. The 1st respondent therefore prayed that the petition be dismissed with costs to the 1st respondent.



Analysis and Determination

51. The petitioners are affected residents of Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub- County in Kisumu County who have filed this suit as a result of destruction of their property occasioned by the respondents on February 6, 2021 from about 2.00pm to 7.00pm in a multi-agency operation that involved earth movers and over 50 police officers.
52. The petitioners have stated in their supporting affidavit that the suit parcels specifically plot numbers 1021,1022,1023,1046,1149,1150,1151,1160,1161,1162,1163,1224 and 1225 form part of the KISIP which is a multi-agency initiative that engages in the streamlining of the land tenure in informal settlements by enhancing tenure security, settlement level planning, infrastructure services provision and planning for future urban growth of informal settlements and to this end has processed titles for Shaurimoyo, Bondeni and Swahili Villages in Muhoroni Sub County. It is also the petitioners case that the PDPs were duly gazetted and Kenya Railways did not raise objections to the process hence titles were processed
53. The 1st respondent alleges that it has no issue with KISIP and is in full support of the project however part of the upgrade done by KISIP in Muhoroni Sub County took place within the railway station which is an area within the authority and control of Kenya Railways Corporation. That it was not consulted neither were its views sought at the time the upgrade was being done and KISIP does not have authority to allocate Railway Land or Land within its station area and therefore it challenges the validity of the PDPs and the Gazette Notices referred by the petitioners. It is also the 1st respondent's case that the demolitions were done lawfully and after the relevant notices were served on the petitioners in order to reclaim all the railway operational area that had been encroached.
54. I have looked at the pleadings, evidence on record and submissions filed by the parties and I am of the view that the following issues need to be determined:

i. Whether the petitioners rights were violated.

55. Section 40 of the [Constitution of Kenya, 2010](#) provides: -
 - (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person--
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).
 - (3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five; or



- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (6) The rights under this article do not extend to any property that has been found to have been unlawfully acquired.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

Article 43 of the [Constitution of Kenya 2010](#) that provides for the socio economic and cultural rights thus: -

- (1) Every person has the right--
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (f) to education.
 - (e) to social security; and
 - (d) to clean and safe water in adequate quantities;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

56. The petitioners have alleged that they were not served with any notice in respect of the demolitions of February 6, 2021. The 1st respondent on the hand has stated that notices were served to the petitioners as per the exhibit BN-1 of its replying affidavit. I have looked at the notices issued by the 1st respondent and do confirm that the same were issued in 2019 and there is no notice from the 1st respondent indicating that the 1st respondent was to carry out evictions on February 6, 2021.

57. I am of the view that the petitioners' right to housing was violated as their houses were demolished without considering their welfare. By destroying the petitioners' houses, churches and schools, the respondent denied the petitioners socio economic and cultural rights under article 43 of the [Constitution of Kenya 2010](#).

58. Pursuant to the advertisement and the gazette notices relating to the PDPs, the same were notices of completion of PDPs for the Settlement Schemes in Muhoroni Sub County and the purpose of the notices was to notify the public that any interested persons who wishes to make any representation or objection to the PDPs to do so in writing. It is evident that the 1st respondent did not raise any objection in relation to the process of preparation of the PDPs yet the 1st respondent in paragraph 11



of the replying affidavit stated that it was never consulted by KISIP during upgrading of the Settlement Schemes.

59. I have further noted that the 1st respondent in paragraph 12 of its replying affidavit stated that KISIP does not have authority to allocate Railway land or land within the station area and it challenged the validity of the PDPs and the Gazette Notices referred by the petitioners and the subject titles prepared in respect of the said plots. Am of the view that the 1st respondent was given an opportunity to challenge the PDPs but failed to do so and if the 1st respondent is in full support of KISIP as alleged in paragraph 10 of its replying affidavit, it ought to have raised objections towards the upgrading of the Informal Settlement Schemes in Muhoroni Sub County.

60. *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security* Embu Petition No 2 of 2011 [2011] eKLR, the court made reference to the provisions of the United Nations Office of the High Commissioner for Human Rights in “The Right to Adequate Housing” Article 11.1; Forced Evictions, where it is stated:

“Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions 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.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

61. Based on the above principles of procedural protection to be applied on forced evictions; on the whether there was genuine consultation with the affected persons; this court is of the view that consultations were never done as the evictions were unlawful and no Relocation Action Plan was made by the respondents to ensure that the Residents of Shaurimoyo, Bondeni and Swahili Villages are resettled or compensated before the evictions were done.

62. On whether adequate and reasonable notice for all affected persons was issued; I am convinced that the petitioners were not issued with notice prior to the said demolitions and the notice being relied on by the 1st respondent was issued in 2019 and not prior to the demolitions of February 6, 2021. On the issue of whether 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; this court is of the view that the residents of Shaurimoyo, Bondeni and Swahili villages in Muhoroni



sub county were aware that the relevant government stakeholders through KISIP were upgrading and the PDPs were availed to them. However, the demolitions were done unlawfully as it has been clearly established that the demolitions breached their fundamental rights and freedoms.

63. On whether groups of people were involved, government officials or their representatives were present during the evictions; it is not clear whether the respondents were present during the demolitions as the petitioners in paragraph 28 of their supporting affidavit stated that the demolitions were carried out using earthmovers and the said demolitions were effected by policemen. The other issue that needs to be determined is whether all persons carrying out the eviction were properly identified; this court is satisfied by the evidence on record that the persons carrying out the demolitions were identified as the 1st respondent in paragraph 14 of its replying affidavit stated that the demolitions was a multi-agency operation that involved the respondents in order to reclaim all railway operational area that had been encroached.
64. Another principle that needs to be considered is that the evictions need not to take place in particularly bad weather or at night unless the affected persons consent otherwise; from the evidence on record, the evictions were carried out from 2.00pm to 7.00pm without consent of the affected persons leaving them homeless. On whether there was provision of legal remedies; and legal aid; the affected persons were not given an opportunity to seek redress from the courts neither were they compensated for the loss suffered.

ii. Whether the petitioners are entitled to the damages sought.

65. The petitioners prayed for special damages of Kshs 190,746,639/= and general damages for breaches in the petitioners' fundamental rights in the bill of rights assessed at Kshs 100,000/= for each of the 206 petitioners creating an aggregate of Kshs 20, 600,000/=.
66. In the case of *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004 that in most cases involving violation of constitutional rights, the remedy of a declaration by the court may not in itself be sufficient and there are cases where "more will be required than words." Lord Nicholls stated in that case that:
- "...A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law."
67. The petitioners' property was destroyed and after the demolitions, the petitioners engaged the services of a Professional Valuer who after carrying out inventories and moderations of the specifics of the items lost or destroyed and arrived at a figure of Kshs 200,156,324/=. I agree with the submissions of the 1st respondent that the petitioners have relied on a computer-generated and handwritten itemization of the assets destroyed and their monetary value without any evidence to prove ownership of the said documents or their value. The petitioners have not produced any receipts, invoices or any bank statements to prove that they suffered loss as a result of the said demolitions.
68. On general damages I am of the view that the same ought to be reasonable. In the present case, the petitioners have prayed for general damages of Kshs 100,000/= for each of the 206 petitioners which amounts to Kshs 20,600,000/=.



69. The Court of Appeal while shedding light on this principle of awarding general damages in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR opined as follows:

“...the South African Case of *Dendy v University of Witwatersrand, Johannesburg & others* - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

70. In the case of *Zipporah Seroney & 5 others v Attorney General* [2020] eKLR the court considered the following factor in awarding general damages:

“124. Taking into account the cited principles, and considering that the award of general damages is not a mathematical exercise, the best guide is the awards previously made to persons whose constitutional rights were violated in circumstances similar to that of the deceased. This is the only way of determining a just and reasonable compensation considering that the parties did not make any proposals in their submissions on what they think should be the appropriate damages in this case.”

71. Based on the above case law, I am of the view that an award of Kshs 20,600,000/= for general damages is reasonable.

72. In conclusion therefore I do order as follows:

1. That this court finds and so declares that the respondents have jointly and severally been responsible for the denial/violation/infringement of the petitioner’s rights and fundamental rights in the bill of rights under articles 10(2)(b), 25, 26, 27(1), 28, 29(f), 39, 40, 43(1)(f), 47 and 56 of the *Constitution*.
2. That the 1st respondent to engage the petitioners and all the Project Affected Persons in Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub County in crafting a Relocation Action Plan.
3. That each of the 206 petitioners be entitled to Kshs 100,000/= creating an aggregate of Kshs 20,600,000/= as general damages for breaches of their fundamental rights.
4. Costs of the petition be borne by the respondents.

DATED AT KISUMU THIS 15TH DAY OF JULY 2022

ANTONY OMBWAYO

JUDGE



This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on March 15, 2020.

