



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Miscellaneous Application 1366 of 2005**

PAUL MUNGAI KIMANI..... 1<sup>ST</sup> APPLICANT

GEOFFREY MUCHIRI GACHANJA..... 2<sup>ND</sup> APPLICANT

SAMUEL GAKOBO MATIA..... 3<sup>RD</sup> APPLICANT

MONICA WAITHERA MACHARIA..... 4<sup>TH</sup> APPLICANT

BEN HADAD KIMANI..... 5<sup>TH</sup> APPLICANT

GRACE NJERI..... 6<sup>TH</sup> APPLICANT

GREOFFREY MICHUKI THEURI..... 7<sup>TH</sup> APPLICANT

JOHN WARUBURI NJOROGE..... 8<sup>TH</sup> APPLICANT

EVAN MWANGI..... 9<sup>TH</sup> APPLICANT

KIMANI KARANJA..... 10<sup>TH</sup> APPLICANT

HENRY KIMANI..... 11<sup>TH</sup> APPLICANT

IRUNGU MWANGI..... 12<sup>TH</sup> APPLICANT

PHYLIS NJAMBI KANYORO..... 13<sup>TH</sup> APPLICANT

MACHARIA MBUTHIA..... 14<sup>TH</sup> APPLICANT

SERAH WANJIRU..... 15<sup>TH</sup> APPLICANT

RAPHAEL NGUGI..... 16<sup>TH</sup> APPLICANT

MARY WAMBUI NJENGA..... 17<sup>TH</sup> APPLICANT

**AGNES WANJIRU..... 18<sup>TH</sup> APPLICANT**

**NELSON NDUGU MUNDI..... 19<sup>TH</sup> APPLICANT**

**JOSEPH MAINA THUITA..... 20<sup>TH</sup> APPLICANT**

**JOHN GIKURU MBURU.....21<sup>ST</sup> APPLICANT**

***(On behalf of themselves and all members of  
KOROGOCHO OWNERS WELFARE ASSOCIATION)*  
VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**PROVINCIAL COMMISSIONER, NAIROBI AREA.....2<sup>ND</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The 21 Applicants namely:- Paul Mungai Kimani, Geoffrey Muchiri Gachanja, Samuel Gakobo Matia, Monica Waithera Macharia, Ben Hadad Kimani, Grace Njeri, Geoffrey Michuki Theuri, John Waruburi Njoroge, Evan Mwangi, Kimani Karanja, Henry Kimani, Irungu Njambi Kanyoro, Macharia Mbuthia, Serah Wanjiru, Rapheal Ngugi, Mary Wambui Njenga, Agnes Wanjiru, Nelson Ndugu Mundi, Joseph Maina Thuita, John Gikuru Mburu filed the Originating Summons dated 16/9/05 on behalf of themselves and on behalf of members of Korogocho Owners Welfare Association in which they seek to enforce their fundamental rights against the Attorney General, the Provincial Commissioner Nairobi Area and the Commissioner of Lands. The Applicants seek the following orders and declarations.

- 1) A declaration that the right to live under section 71 of the Constitution includes the right to live in dignity and protection of one's shelter means of a livelihood.
- 2) A declaration that a semi-permanent structure is property within the meaning of S 75 of the Constitution.
- 3) A declaration that the Applicants and all other members of Korogocho Owners Welfare Association (hereinafter referred to as the 'association') are entitled to be registered as proprietors/owners of the plots on which their semi-permanent houses stand.
- 4) As an alternative to 2 above, a declaration that the Applicants and all other members of Korogocho Owners Welfare Association are entitled to be issued by the 3<sup>rd</sup> Respondent with leases for 99 years in respect of the parcels of land on which that semi-permanent structures are constructed.
- 5) An order that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent do forthwith issue the Applicants and all other members of Korogocho Owners Welfare Association leases for 99 years over are the areas on which the plots stand.
- 6) A permanent injunction to restrain the 2<sup>nd</sup> Respondent his servants and/or agents from interfering with the Applicant's and all other members of Korogocho Owners Welfare Association possession of their respective

plots on which their semi-permanent structures are situated.

- 7) An order that the Respondents pay the costs of the application.

The Originating Summon is supported by grounds found in the body of the application, an affidavit sworn by Paul Mungai Kimani who describes himself as Chairman of the Association and has the authority of the co-applicants and other Association members to swear it, a supplementary affidavit of Paul Mungai Kimani dated 26/6/06, skeleton arguments dated 24/10/06 and a list of authorities dated 24/11/06; replying affidavit by Phylis Njambi Kanyoro 13<sup>th</sup> Applicant dated 15/5/08 and another by the 1<sup>st</sup> Applicant Mungai Kimani dated 7/2/08.

The Respondents opposed the Originating Summon and Gordon Ochieng, a Senior Lands Officer with the 3<sup>rd</sup> Respondent swore an affidavit dated 16.7.08 and skeleton arguments on behalf of the Respondent are dated 16/7/08.

The issues that will need to be determined are

- 1) Whether the Applicants can bring a representative suit.
- 2) Whether the pleadings disclose any cause of action.
- 3) Whether the Applicants rights under sections 71, 74, 75, 77, 81 and 82 have been breached.

A brief background to this case is contained in the affidavit of Paul Kimani and the statements marked PMK 6, written by members of the Association on how they came to occupy the plots they now claim. The Applicants claim to be poor landless people who were relocated to Korogocho from various parts of Nairobi i.e. Highridge, Grogon. That the Association is made up of 2,584 members who own plots and lands in Korogocho Location, of Kasarani Division in Nairobi. They exhibited a certificate of registration of the Association PMK

3. That the Applicants are members of the Association and were allocated the plots in the 1970s and 1990s and an average has 4 to 7 rooms occupied by the allottees and the families, some are mud houses roofed with iron sheets. Others made of iron walls and corrugated sheets on roofs, while others are stone buildings. Photographs were exhibited as 'PMK 4' That the plots were curved from Government, land, Korogocho LR 82 – 85 CL. That 82 - 85 remains unalienated Government Land within the meaning of Cap 280 Laws of Kenya and the same can be alienated to the citizens through Government officers or the President and by invoking sections of the Government Lands Act. The 3<sup>rd</sup> Respondent is the Chief Administrator of Government land. That the Applicants fell into two categories whereby some of the Applicants were allocated the land by the Government in the 1970s while some are heirs to their original allottees. That the Applicants were moved from that original abode by City Council and Administrative police and after allocating them plots or 60ft x 60ft, promised to issue them with Title deeds. They have developed the said plots. In 1986 the then President Arap Moi visited Korogocho and ordered roads to be constructed, electricity installed and the directive was implemented (PMK 7). Between 1978 – 2000 the applicants applied to the P.C Minister for Lands and

Commissioner of Lands and City Council to arrange to issue them with title deeds or the legal documents but none have been issued. From time to time they have been harassed by the Provincial Administration who want to take away the plots and allocate to others. On 25/7/00 the Applicant and some other 377 members petitioned the President to issue them with title deeds (PMK 8). That at a public rally (baraza) held by the President on 22/11/00, he directed that the Respondents together with the City Council of Nairobi ensure that the Applicants be issued with titles as evidenced by newspaper report (PMK 9). That the provincial administrative then started to interfere with the Applicants' possession of the land. On 11/5/2001 they were informed of the Government's plan to pull down the houses to come up with new permanent houses which was contrary to the proviso of title deeds. The Applicants filed a Judicial Review application on 14/6/01 (PMK 11). The application was however withdrawn on advice of counsel. Because of the promises made on the Applicants and which they believed to be true, the Applicants are entitled to be issued with title deeds. Mr. Gacheru, counsel for Applicants submitted that since the facts deponed to by Paul Kariuki were not controverted, they should be taken to be the truth. That this court should adopt a broad and a liberal interpretation of the rights as adopted in *NJOYA & 6 OTHERS V AG (2004) I KLR 361 and NDYANABO V AG (No.4) (2001) 2 EA 485*, In respect of S 77 counsel argued that the courts in India have held right to life to include right to human dignity with basic necessities. Reliance was made on *PETER WAWERU V REP HMISC 118/04* where the court made a liberal interpretation to include right to suitable environment. That the decision to evict the Applicants is depriving them of their livelihood. Reliance was also made on the Article by **Bhagwati, Domestic Application of Human Rights**. On S 75 of the Constitution, it was submitted that the court should accord the word property a broad meaning like in the case of *SHAH V AG* where the court held that a contract is property. He argued that the facts give use to a proprietary estoppel against the Government.

In opposing the Originating Summons, Gordon Ochieng deponed that the land occupied by the Applicants is Government land within the meaning of the Government Lands Act Cap 280 Laws of Kenya and it is comprised of various parcels of sizes of land. That he has perused the records held at the lands office and found that they have never been alienated to anybody, there are no records showing allocation of the land to anybody and that no formal documents have been availed to the Government of lands from the President seeking that the land be allocated to the Applicants and that there is no record of the physical removal of the Applicants from the Highridge and Grogon Areas. He denied knowledge of the Association which brings this application. That when the Government decides to upgrade the living conditions of residents of a slum, it is done formerly through projects like the Mathare and Kibera upgrading projects and more has come up to upgrade the Korogocho Slums. That the Respondents have not taken any action that legally binds them to allocate land to the Applicants and that some of Korogocho residents live on power way lines or under High power voltage lines and should be removed but the removal has been delayed on humanitarian grounds. That the slum lacks adequate social amenities and if the orders are granted they may be different to implement.

From the onset I wish to agree with the Respondent that the Applicants have not placed before this court any evidence to prove that the land on which they live in Korogocho slums was allocated to them by the Provincial Administration, City Council of Nairobi or any Government official. The senior land officer who swore an affidavit denies that the land office has received any communication from the President or elsewhere that the land be allocated to the Applicants. All that the Applicants have exhibited is a directive made by President at a meeting in Korogocho that the residents be issued with title deeds for the plots on which they reside. Even after the directive, there is nothing to show that those directed to issue the titles ever took action or that they can take action on such directive.

**Whether S 84 confers group rights:**

The Applicants claim to have filed their Originating Summons on their own behalf and that of a group known as the Korogocho Owners Welfare Association members totaling, 2,584 owners of plots and houses in Korogocho location. The Respondent submits that fundamental rights and freedoms are individual rights and not group rights and therefore no cause of action is disclosed under S 84 of the Constitution. S 84 provides for enforcement of fundamental rights. It reads as follows:

***“84 (1) subject to subsection (6), If a person alleges that any of the persons of Ss 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person, then without prejudice to any other action with respect in the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”***

Under the above section, only two classes of persons can invoke that section.

1. One whose rights have been, are being or are likely to be contravened.
2. A person who is detained can have somebody else file suit on his behalf.

The section does not envisage representative or group actions. Each person has to approach the court individually and plead his case. This is because these are rights personal to each individual. The Applicants cannot purport to bring a representative suit on behalf of the Welfare Association. Each person would have to approach the court to enforce their individual rights allegedly breached under Ss 71, 74, 75, 77, 81 and 82 of the Constitution. The present originating summons cannot be sustained as pleaded. The 21 Applicants cannot be heard to represent any others who are not before the court. The 21 Applicants can only enforce their individual rights and those not before this court cannot sustain an application under S 84 of the Constitution.

**Whether the originating summons discloses any cause of action:**

It is trite law that he who complains that his rights have been or are likely to be breached, shall state the provision under which he complains, the nature of the complaint, how his rights have been or are likely to be infringed and the manner in which the rights have been infringed. In *MATIBA V A G MISC.666/1990* , the court held,

***“An Applicant in an application under S 84 (1 of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed.***

***— are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement.”***

Again in *ANARITA KARIMI NJERU V R (NOI) 1979 KLR 154* Trevelyan and Hancox held,

***“We would however again stress that 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”***

The above cases represent the position the courts have taken in Kenya. In *KBS V A G HMISC 413/05, CYPRIAN KUBAI V STANLEY KANYONGA MWENDA 14/2005 HM 612/02 AND MANY OTHERS*. I do appreciate that the Originating summons was filed under Legal Notice 133 of 2001 now repealed. However the above decisions have captured the Rules promulgated under Legal Notice 6/2006 or The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Forms D, E and F in the schedule to the Rules show how a party should approach the court under S 84 of the Constitution. These Forms clearly show that one has to plead with particularity the provision of law allegedly infringed, the nature of the infringement. In the instant case, the Respondents contend that the Applicants have not met the threshold of an application under S 84 and this originating summons should be dismissed. I have read the affidavits filed by the 1<sup>st</sup> Applicant and others and nowhere have they specifically pleaded how S 71 was breached, the nature of infringement in relation to each of the applicants, the manner in which it has been infringed.

S 71 offers protection to right to life. It reads as follows:-

***“(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.***

***(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in these cases hereafter maintained, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case.***

(a) for the defence of any person from  
defence of property.

violence or for the

(b) in order to effect a lawful arrest or to  
person lawfully detained.

prevent the escape of a

(c).....

(d).....”

This section seems to limit the right to life to the mere human existence or elimination from physical existence but not to other rights that go with it. This can be deduced from the limitations to the right under S 71 (2). This court has been urged to give the said section a liberal interpretation like the Indian courts have done. In Kenya the court in *PETER WAWERU V REP NARIBOI MISC. APP. 118/04* the court in interpreting S 71 said as follows:-

**“Under S 71 of the Constitution all persons are entitled to the right to life. In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man, it is inherent from the act of creation, the recent reinstatement in the statutes and the Constitution of the Worlds notwithstanding.”**

Apart from the Constitution the right to clean environment has also been included in S 3 of Environmental Management and Co-ordination Act. That section reads in part.

**“ Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.”**

The Indian courts have interpreted right to life to include right to food, shelter and education etc. Section 21 of the Indian Constitution provides for right to life. It reads as follows:-

**“S 21 Protection of life and personal liberty – no person shall be deprived of his life or personal liberty except according to procedure established by law.”**

The provision relating to life in the Indian Constitution does not have specific limitations like the Kenyan provision. The limitations are general – the right is only limited by procedure established by law. That is why the Indian provision on life can be interpreted in a more broader perspective than the Kenyan provision. The Indian provision can be subject of a very wide interpretation of the right to life unlike the Kenyan provision. And I would agree with the Court of Appeal case from Lesotho, *BAITSOKOLI & ANOR V MASERU CITY COUNCIL AND OTHERS C/A 4/2005*.

Section 5 of the Lesotho Constitution is nearly similar to our section 71.

In that case some street traders who had stalls in the City of the Capital carrying out their trade along the City's main street challenged their removal by the City Council to a new market as breaching their right to life as protected by section 5 or (71) of the Lesotho Constitution on the grounds that their removal resulted in a significant fall in their sales which jeopardized their livelihood and their very survival as they could not meet their basic needs to food and clothing. The court dismissed their application for reasons that the right to life under S 5 did not include right to livelihood. They appealed the Appeal was dismissed. S 5 of the Lesotho Constitution is more or less similar to our S 71.

That Court of Appeal held inter alia

***“(3) It is a well-established principle that a constitutionally entrenched fundamental right in a justiciable Bill of Rights should be given a generous interpretation. At the same time, the language of the Constitution must be respected and not ignored in favour of a general resort to ‘values’ leading not to interpretation but divination. Rather, it is context which should determine the ambit of a provision.***

***(4) Caution must be exercised in making reference to authorities from other jurisdictions which, although frequently of value and sometimes of importance, can result in the blithe adoption of alien concepts or inapposite precedents.***

***(5) Section 5(1) states the right to life in both positive and negative terms recognizing both an inherent right and a prohibition or arbitrary deprivation whilst the further provisions make clear that the protection afforded by S 5 relates to life in the sense of ordinary human existence.***

***(6) – 8”***

The Lesotho Court cautioned that even as the court made reference to authorities from other jurisdictions, though valuable and important, may be inappropriate for our circumstances. Though the Indian approach to the right to life may be commendable for giving the provision a generous interpretation, yet the language of our Constitution must be respected and not ignored. S 71 of our Constitution in my view relates to life in the sense of ordinary human existence and must be understood in that context.

S 74 which has also been invoked offers protection from torture inhumane or degrading punishment or other treatment. Again the Applicants have not pleaded anywhere, the nature of their complaint, the manner in which their rights have been infringed in respect of each of them and the manner in which it has been infringed.

S 75 offers protection against compulsory deprivation of property. Again the Applicants have not demonstrated what property the Respondents intend to deprive them of, the nature and manner of infringement. The land for which they seek to be issued with title deeds is Government land and so can they rightly claim that they are being deprived of their property when it is the Government land. The houses on the suit land belong to the Applicants and although they allege that there are plans to evict them, there has been no concrete evidence to that effect. The Respondent said there are

no immediate plans to evict them.

S 77 (2) guarantees right to a fair hearing before a criminal court. Section 77 (9) guarantees right to a hearing before a civil court. There is no specific pleading as to how the said rights have been infringed or are likely to be infringed in respect of each one of the Applicants or whether it is in civil or criminal proceedings.

The Applicants also invoked section 81 of the Constitution which guarantees freedom of movement.

***“81. (1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.***

***(2) Any restriction on a person’s freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.***

***(3) Nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of this section to the extent that the law in question makes provision -***

***(a) for the imposition of restrictions on the movement or residence within Kenya of any person or on any person’s right to leave Kenya that are reasonably required in the interests of defence, public safety or public order;***

***(b).....***

***(c).....***

***(d).....***

***(e).....***

***(f).....***

***(g).....***

***(4) If a person whose freedom of movement has been restricted by virtue of a provision referred to in subsection (3) (a) so requests at any time during the period of that restriction not earlier than three months after the order was made or three months after he last made the request, as the case may be, his case shall be reviewed by an independent and impartial tribunal presided over by a person appointed by the president from among persons qualified to be appointed as a judge of the High Court.***

***(5).....***

***(6).....”***

The section states that no citizen shall be deprived of freedom of movement, right to move throughout Kenya, right to reside in any part of Kenya or the right to enter Kenya and right to be citizen and it immunizes one from expulsion from Kenya. The Applicants did not plead with particularity which of the above rights was infringed or manner of infringement as relates to each of them.

S 82 offers protection from discrimination. S 82 (3) categorizes the different kinds of treatments that constitute

discrimination based on race, tribe, religion creed sex etc. The Applicants have not specifically pleaded how they were discriminated against or who has been favoured by the Respondents to the disadvantage of the Applicants. The Applicants never brought themselves within any of the categories listed under S 82 (3) of the Constitution. I find and hold that the Applicants pleadings are wanting in particularity of what they complain of, under the various sections cited and the Respondent would not have known how to respond to these allegations. The court therefore finds that the pleadings do not disclose a cause of action that the Respondent should be called upon to respond to.

There being no cause of action there is really nothing for this court to consider in relation to whether the Applicants should or should not be issued with title deeds for the plots which they occupy or be declared owners of the plots they reside on. Firstly, courts do not issue orders in vain. It is noteworthy that there is not even a map of Korogocho slums exhibited showing exactly where the Applicants reside if at all and where the land to be allocated is. The Respondent contended that some of the Applicants have built houses on way leaves and under power lines and have to be vacated. This court would not issue such orders to give title to the Applicants as that area is set aside for allotment to the petitioners. If this court were to grant such an order for issuance of title deeds to the Applicants for the plots they live on, it might be an order in futility and may be difficult to implement Korogocho is vast slum with thousands of people living there. Giving such orders as sought without establishing whether the Applicants live there, where exactly in Korogocho would be futile. All those residents are landless poor people. If the 21 Applicants are issued with title deeds for their plots what happens to the rest of the slum dwellers and shouldn't the issuance of titles be done once to all the slum residents?

In Conclusion, the orders and declarations sought in the originating summons are declined with each party bearing their own costs.

Dated and Delivered at Nairobi this 12<sup>th</sup> day of March 2010.

**R.P.V. WENDOH**

**JUDGE**

**Present:**

Mr Gacheru for Applicant  
Ms Kamejo for Respondent  
Muturi Court Clerk