



**Onyango v Incharge, Nyahera Sub-County Hospital & 4 others (Environment & Land
Petition E019 of 2021) [2022] KEELC 14441 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14441 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION E019 OF 2021
A OMBWAYO, J
OCTOBER 27, 2022
IN THE MATTER OF ARTICLES
1,2,3,10,19,20,22(1),23, (1) & (3), 48,50(1),
(60),64,67,73,159,160,162(3),258(1)
259 & 260 THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF SECTION 3(B),4(1) & (2),5(1) &
(2)
128 & 150 OF THE LAND ACT, NO.6 OF 2012
AND
IN THE MATTER OF SECTION 24(A) & 101 OF THE
LAND REGISTRATION ACT, NO.3 OF 2012
AND
IN THE MATTER OF THE NATIONAL LAND
COMMISSION ACT, NO.5 OF 2012
AND
IN THE MATTER OF RULES 23 & 24 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013
AND
ELC PET NO. E019 OF 2021
IN THE MATTER OF THE LAND PARCEL NO.



KISUMU/NYAHERA/1272

BETWEEN

JOSEPH GOYE ONYANGO PETITIONER

AND

INCHARGE, NYAHERA SUB-COUNTY HOSPITAL 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. Joseph Goye Onyango, (hereinafter referred to as the petitioner) has come to court against the incharge Nyahera Sub-county Hospital, The County Government of Kisumu, National Land Commission, The Cabinet Secretary, Ministry of Health and The Hon Attorney General, praying for a declaration that the respondents actions of invading the petitioner's parcel of land to wit Kisumu/Nyahera/1272 destroying crops, trees and structures thereon in order to expand Nyahera Sub County Hospital (previously Nyahera Health Centre) was unlawful and an infringement of the petitioner's right to property. He seeks a Judicial Review order by way of an order of mandamus, to compel the respondents to pay the Petitioner compensation for the unlawful acquisition of his land now valued at Ksh 4, 148,029.00. That the respondents to pay the petitioner special damages of Kshs 1, 483,737/=.
2. Moreover that the respondents to pay the petitioner General damages for trespass and interest and costs of this petition.
3. The facts of the case according to the petition are that sometimes around 1980 the petitioner's land being Land Parcel No Kisumu/Nyahera/1272 was irregularly and unlawfully acquired by the 4th respondent acting through the now defunct provincial administration in a purported compulsory acquisition exercise. That the purported compulsory acquisition exercise was aimed at acquiring extra land for the expansion of the 1st respondent then known as Nyahera Health Centre so as to create room for its staff quarters and outpatient wing and also create a road through it leading to the office of the East Kisumu chief's camp wherefore the petitioner and his family was compelled to vacate the suit land to pave way for the planned exercise. That Nyahera Health Centre has since been upgraded to Nyahera Sub County Hospital.
4. The petitioner then student was promised compensation which, in law, is a matter of right, by 4th Respondent which is in charge of the 1st respondent and Ministry of Lands & Physical Planning whose function in so far as compensation following compulsory acquisition relates has been taken over by the 3rd Respondent.
5. That to date and despite the fact that the 4th respondent took possession of the petitioners parcels of land, destroying the development thereon which comprised houses, crops and a tree plantation and erecting several structures on a portion thereof and thereby effectively displacing the petitioner and his



- family the petitioner has never been compensated for the said purported compulsory acquisition of his land herein being Kisumu/Nyahera/1272, and as a result the petitioner has suffered and still continues to suffer loss and damage.
6. That the said denial of compensation has also resulted to violation of the petitioner's right to property and right to compensation has also resulted to violation of the Petitioner's right to property and right to compensation guaranteed under the Constitution since he as been rendered homeless together with his family besides being denied an opportunity to use his property since 1980 to date.
 7. That the petitioner has written many letters to the relevant Government offices and agencies in the hope of being compensated but all in vain.
 8. That the petitioner herein is entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) of the Constitution.
 9. Vide letter dated April 25, 2012, the 1st respondent confirmed that part of the suit land measuring 0.0804 was incorporated as part of the Health Centre and requested the Kisumu North District Commissioner (as it then was) to call a meeting so as to commence the compensation process but all proved futile.
 10. Sometimes around 2014, the petitioner approached the Governor, Kisumu County, who referred him to the County Secretary. The county Secretary referred the Petitioner to the Chief Officer of lands and the latter subsequently referred the petitioner to the County Attorney. The County Attorney found that the petitioner's claim was genuine and advised County Secretary to commence the compensation process yet to date nothing has happened.
 11. That earlier vide a letter dated October 28, 2009, the predecessor of the 4th defendant informed the petitioner that he was requesting the health centre committee of the Nyahera Health Centre to formally write to the permanent secretary ministry of medical services and the permanent secretary ministry of lands to request for compensation but all have proven futile.
 12. That the 2nd respondent acting through its chief officer housing and urban development vide a letter dated June 23, 2020 admits having established that the suit parcel of land belongs to the petitioner and that a portion of Nyahera Sub county hospital stands on the said parcel of land and recommended that the portion of land belongs to the petitioner and that a portion of Nyahera Sub County Hospital stands on the said parcel of land and recommended that the portion of land belonging to the petitioner which is irregularly occupied and developed by the Nyahera Sub County Hospital be compulsorily acquired and proceeded to escalate the issue to the 3rd Respondent being the constitutional body mandated to compulsorily acquire land on behalf of both the county and national governments for further guidance.
 13. That the 2nd respondent similarly through the office of the county attorney has vide a letter dated July 6, 2015 has admitted that there is encroachment on the petitioner's parcel of land and has been advised by the said office to commence and institute compensation mechanism for the affected parties so that the then health center could assume legal possession of the entire parcel of land.
 14. That the 1st respondent does not dispute and has in fact vide various letters specifically a letter dated April 25, 2012 admitted that a portion of Nyahera Sub County Hospital lies on a portion of the petitioner's parcel of land to wit land parcel No.Kisumu/Nyahera/1272 and acknowledge the petitioners claim.
 15. That despite crop assessment report being prepared by the Ministry of Agriculture in February 1980 and confirmation thereof being made by the then Chief East Kisumu location via a letter dated



November 2, 1981 addressed to the District Agricultural officer the petitioner's name was omitted from the list of those who ought to have been compensated.

16. Further, the petitioner states that vide letters of February 8, 1984 the then District Commissioner Kisumu confirmed that the petitioner had not been compensated and in fact that his name had inexplicably been omitted for the list of those to be compensated and a fact similarly confirmed by the District Officer, Maseno Division (as it then was) vide a letter dated March 15, 1985.
17. That *vide* a report and valuation dated March 1, 2019, done by Highlands Valuers Limited that the value of the suit parcel of land encroached upon by the 1st respondent and the damaged houses, crops and trees have been valued at Kshs 4,148,029/= which the petitioner now claims as compensation together with interest thereon.
18. That in the foregoing it is the petitioner case that the aforementioned actions by the 1st and 4th respondents also amount to trespass into the suit land and the petitioner contents that the said act of trespass is actionable per se and the petitioner is claiming General Damages for trespass.
19. That the said act of trespass is actionable per se and the petitioner is claiming General Damages for trespass.
20. That all respondents herein have looked into the petitioner's claim but have blatantly and adamantly ignored the same.
21. The respondents have committed grave errors in law in the exercise of their functions and the court should give appropriate directions to prevent miscarriage of justice.
22. The petition claims that his right to property and protection thereof has been violated and yet he is protected by Article 40 of the constitution. The encroachment on his land by a state organ is a breach of the constitution of Kenya 2010.
23. The petitioner claims that his right to property payment in full and want compensation as guaranteed under Article 40 (3) (b) (i) of the constitution of Kenya 2010. This is buttressed
24. By section 111(i) of the land Act No 6 of 2012 that provides for just compensation after compulsory acquisition. the plaintiff argues that no right to equality and freedom from had been breached. Moreover, that the respondents have trespassed into the petitioner land. The petition is supported by the affidavit of Joseph Goye Onyango where he reiterated the facts in the petition. The respondent failed to file a response.
25. I have not seen submission in the record filed as directed by the court.

Article 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.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Section 111(1) of [Land Act](#) 2012 provides

Compensation to be paid

Section 111(1) of [Land Act](#) 2012 provides

Compensation to be paid.

111. (1) if land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. It is evident that the petitioner is the registered owner of Kisumu/Nyahera/1272 and that the respondents have encroached on the said parcel of land. There is no explanation by the respondents how they came to enter into the petitioner's land and constructed a health center or erected a road therein. [Trespass Act](#) defines trespass as: -

Section 3 (1) of the [Trespass Act](#), Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

26. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. It is trite Law in that trespass is actionable per se. I do find that the act of encroachment to the petitioner land was an act of trespass. There is no evidence of compulsory acquisition and therefore I do find that the occupation of the petitioner land by the respondent is illegal.
27. I have looked at the valuation report and it is ascertained that the parcel of land occupied by the respondent is 1.48 acres. I do award the petitioner a declaration that the respondents' actions of invading the petitioner's parcel of land to wit Kisumu/Nyahera/1272 destroying crops, trees and structures thereon in order to expand Nyahera Sub County Hospital (previously Nyahera Health



Centre) was unlawful and an infringement of the petitioner's right to property. I do grant an order of mandamus, to compel the respondents to pay the Petitioner compensation for the unlawful acquisition of his land now valued at Ksh 4, 148,029.00. That the respondents to pay the petitioner special damages of Kshs 1, 483,737/=.

28. Moreover, that the respondents to pay the petitioner General damages of Ksh 1,000, 000, (one million only) for trespass and interest and costs of this petition. Orders accordingly.

Dated and delivered at Kisumu this 27th day of October 2022.

A .O OMBWAYO

JUDGE

elc pet no. e019 of 2021	0
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