



**Minayo & 240 others v Principal Secretary Ministry of Lands Housing
And Urban Development & another (Environment & Land Petition
12 of 2021) [2022] KEELC 15156 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 12 OF 2021
JA MOGENI, J
NOVEMBER 30, 2022**

BETWEEN

BEATRICE MINAYO & 240 OTHERS PLAINTIFF

AND

**PRINCIPAL SECRETARY MINISTRY OF LANDS HOUSING AND URBAN
DEVELOPMENT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The petitioners are residents of Soweto Zone B in Kibera within Nairobi in the Republic of Kenya. They were selected as participants and beneficiaries of Kibera Slum upgrading project. The project is undertaken under the auspices of the Kenya Slum Upgrading project and jointly funded by the government of Kenya and UN Habitat Mission which encompasses the provision of housing and improved conditions of residency.
2. The petitioners contend that the respondents have failed and/or neglected to issue unique identification cards to them as well as provide compensation as was agreed at a meeting at convened at Nyayo Stadium on November 16, 2018. They aver that the applicant's right to property guaranteed under article 40 of the Constitution would be gravely prejudiced if the respondent is not restrained from evicting and demolishing the applicant's structures and especially when they haven't been compensated as required. The petitioners filed an amended petition dated February 16, 2022 in which they prayed for the following orders:
 - i. A declaration that the threatened evictions by respondents violate the principles of the Constitution and are thus unconstitutional.



- ii. A declaration that failure to issue the petitioners special identification and yet they have been enumerated violates the principle of expeditious, efficient, lawful, reasonable and procedurally fair administrative action enshrined in articles 27,47,8 and 50 of the Constitution.
- iii. That the said unique identification cards be issued through the advocates on record for the petitioners.
- iv. Costs of this petition.
- v. Any other or further relief that this honourable considers appropriate and just to grant.

Brief Background to the Petition

3. The government conducted a sensitization course for residents and enumeration exercises to identify genuine residents. The petitioners were enumerated and numbers were plastered on each intended and genuine beneficiaries' door. The residents were called to meetings on several occasions at Canaan Social Hall in Kibera to discuss issues relating to resettlement. At the last meeting at the same social Hall officials from the Ministry of Lands Housing and Urban developed together with the local ad hoc committee, instructed them to pose for photos while holding special numbers plastered on their doors during enumeration.
4. A meeting was then convened on November 16, 2019 at the Nyayo National Stadium by the Principal Secretary Ministry of Housing and Urban Development. The petitioners were locked out of this meeting as only those who held unique identification cards issued by the ministry were the only ones allowed to attend.
5. It is the petitioners contention that, the 1st respondent has abdicated its duty of compensating the petitioners who hold special numbers given to them during enumeration and are yet to be issued with the unique identification cards. Therefore, violating article 43 of the Constitution.
6. The petitioners aver that, the process of issuing the identification cards and compensation has ended and they have neither received the unique identification cards nor compensation. Further the petitioners are threatened with eviction as per the directive by the ministry that all should have vacated by November 30, 2019.

Particulars of threatened or actual violation of fundamental rights and freedom

7. The right to property is threatened with violation if this honorable court does not quash the decision of the 1st respondent to evict the petitioners. Article 27 of Constitution of Kenya guarantees equal protection and equal benefit of the law for all persons and this right is likely to be violated unless the petitioners are compensated and issued with unique identification card.
8. By purporting to cancel, deny and omit them from being beneficiaries of the above programme, yet they were enumerated, the respondents' decision and actions amount to unfair administrative practices which violate the principle of expeditious, efficient, lawful, reasonable and procedurally fair administrative action enshrined in Constitution and thus falling foul of articles 27,47,48 and 50 of Constitution and should not be allowed to stand.
9. While article 259(1) of Constitution requires Constitution to be construed in a manner that promotes its purposes, values and principles and in a manner that advances the rule of law, and the human rights and fundamental freedoms in the bills of rights, Constitution is threatened with contravention if the



decision of the first respondent to neglect, decline and or refuse to compensate and issue the unique identification cards is allowed to stand.

The Petitioners Case

10. The petitioner's case is set out in the petition, the supporting affidavit, and the submissions thereof. Broadly, the petitioner asserts that in August 2018, the officials carried out an enumeration exercise and numbers were indicated on each resident of Soweto Zone B's door for the purpose of compensation to the new upgraded houses. In the same month they enumeration was done, the team undertaking the exercise took photos of every individual with structure numbers held to the chest at Canaan Social Hall in Kibera. Also, together with other petitioners, they were enumerated and actively took part in the exercise, with photos to prove it.
11. The photos were not distributed to those who participated as they were meant for official use. However, the residents who participated were told to wait for the unique identification card. On the 16th of November, a meeting was convened at Nyayo National Stadium by the Committee and the leadership of the Slum Upgrading Programme to brief the persons affected by this exercise. The meeting was exclusively for those who had received the Unique identification cards, Permanent Secretary, Director of Slum upgrading Programme and the Deputy County Commissioner attended the Nyayo meeting.
12. The meeting resolved that the remaining residents of Soweto Zone B who had not been issued with cards and compensation cards were to be paid by November 30, 2019. Thereafter the process of demolition was to begin. There was a notice issued to the residents verbally by the Chairman of the Committee overseeing the Slum Upgrading Programme within Soweto Zone B directing that the residents vacate by November 30, 2019. Initially the Ministry proposed a compensation of Kshs 19,000 but the officials protested whereupon the amount was raised to Kshs 58,000 for tenants and Kshs 68,000 for structure owners. The enumerated residents were also to be issued with unique identification cards.
13. However, the issuance of the unique identification cards was shrouded in mystery, as some of the residents that have received the cards are yet to be compensated. The process of issuing the Unique Identification cards was shrouded in mystery. Equally, numerous demands to the local committee to provide the notice to vacate, the list of residents to be resettled and the amount approved for compensation from the Ministry of housing have been declined.
14. On November 24, 2019, Mr Charles Shikuku, the Director Slum Upgrading Programme came to Kibera Soweto Zone B Nairobi and upon raising these concerns to him he requested that those who have not received their cards and compensation to provide their bank details but to date no substantial or tangible help has been forthcoming.
15. The petitioners mentioned specific constitutional infringement as being under articles 1(1), article 19, 20(1) and (2), 22(1), 23, 165, 27, 47, 48, 40, 50, 65, 159 and 259(1).
16. The petition is opposed by the 1st and 2nd respondents who filed a replying affidavit dated June 29, 2022.

The 1st and 2nd Respondents Case

17. That the Government has been mandated to provide decent housing for Kibera People in Kibera Soweto Zone A to D. Currently, the Government is working on Zone B with the intention of constructing 4000 units.



18. That between 13th and August 31, 2018, the enumeration of the project affected persons for Kibera Soweto Zone B was done, where eight thousand and one and forty-eight (80148) persons were enumerated. Again, a verification exercise to ascertain the genuine residents was held between November to December 2018, through teams drawn from the Ministry of Interior and Coordination of National Government, Settlement Executive Committee and the State Department for Housing and Urban Development.
19. That a dispute resolution committee was formed to deal with grievances that arose as a result of enumeration and physical verification exercises. The grievances window had been open for genuine cases. The number of the beneficiaries who hold the enumeration cards after the verification are now three thousand nine hundred and nine (3909). The exercise was coordinated by the Ministry of Interior and Coordination of National Government. However, the petitioners failed to present themselves for the enumeration and or verification exercise.
20. The respondents postulate that, in a meeting held at Nyayo Stadium on November 6, 2019 a consensus on the modalities of vacating the site was reached and the Project Affected Persons (PAPS) voluntarily agreed to vacate the site by November 2019, there is no eviction that was carried out by the respondents. Further, the demolition of structures and clearance of the grounds was therefore done voluntarily by individual structure owners and tenants carried their wares as agreed by the project affected persons.
21. The respondents assert that, the unpaid 552 PAPS are encouraged to provide the Ministry with accurate bank details. However, the petitioners could not be facilitated since they did not have unique identification cards. Also, the project affected persons voluntarily demolished their structures since November 2019. The site is secured /corded and ready for re- development. Again, the petition is premature since the facilitation process for both the tenant and landlord has been and is still ongoing until all the cases of duly registered persons have been dealt with.
22. The respondent avers that, the petitioners are only out to derail the Government's efforts to deliver on its constitutional mandate to deliver affordable, accessible and adequate housing to Kenyans in the affected areas.

The Petitioners Submissions

23. The petitioners filed submission and further submissions dated April 21, 2022 and July 12, 2022 respectively.
24. To determine whether the petitioners are the residents of Soweto Kibera, Counsel for the petitioners submits that *vide* a witness Statement by David A Joram and an affidavit by Beatrice Minayo, the Petitioners are the residents of Soweto Kibera. However, the 2018 project petitioners do not have similar proof of the enumeration as the Ministry withheld the same.
25. To establish whether the petitioners were enumerated and verified, counsel for the petitioners through the affidavits of Beatrice Minayo, Nelson Anindo and Isaac Ayanga Ayanga, submits that the petitioners were enumerated and verified in August 2018, and have duly provided their identification and structure numbers
26. On whether the petitioners are entitled to benefit from the project, counsel for the petitioners relied on the decision in *David Ngige Tharau & 128 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 others* [2016] Eklr and submitted that to benefit from the slum Upgrading Programme in Soweto Kibera, one had to be a resident of the area during enumeration and be verified. In the given case, the petitioners were enumerated and verified but the proof of verification in the 2018 exercise was withheld by the 1st respondent possibly in anticipation of any suit to deprive



the petitioner's proof of enumeration. Thus, the petitioners plead that the honorable court grant or direct that the names and beneficiaries of all slum upgrading programs in Soweto one B Kibera in Nairobi County be published.

The Respondents Submissions

27. The respondents filed written submissions dated July 4, 2022.
28. To determine whether the petitioners are entitled to unique identification cards, counsel for the respondents relied on the decision in *Teresia Waititu & 129 others v Principal Secretary Ministry of Transport, Infrastructure, Urban Planning & another* [2022]eKLR and submitted that, as per the respondent's replying affidavit the court should note that the petitioners were unsuccessful in the provisional list mainly because they failed to present themselves for the verification/enumeration or they failed to meet the requisite test of qualification for genuine residents.
29. To establish whether the eviction done by the 1st respondent was unconstitutional, counsel for the respondents contended that there was a meeting held on November 6, 2019 at Nyayo National Stadium. However, the people who were allowed at the venue were the bonafide purchasers who held enumeration cards as the meeting was meant to brief them on matters of relocation. On the other hand, the petitioners were denied access to the meeting as they were devoid of the unique identification cards. these cards the respondent submitted were issued to persons affected with the eviction after enumeration and verification had taken place. During enumeration 8148 persons were identified. The second exercise which took place between November to December 2018 was the verification exercise which sought to ascertain genuine residents. The exercise ascertained 3909 and these were the ones issued with
30. Again, counsel for the respondents submitted that, in the said meeting, a consensus on modalities of vacating the site was reached whereby the project affected persons voluntarily agreed to vacate the site by November 30, 2019. The demolition of structures and clearance of the ground was done voluntarily by individual structure owners and tenants since November 2019 and the site is coded and ready for re-development.
31. Consequently, the petitioners cannot therefore claim that the eviction was unconstitutional or threatening as consensus was reached and the same was done voluntarily by the bona fide beneficiaries as it had been agreed.
32. Further, to determine whether the petitioners are entitled to the orders sought, counsel for the petitioner submitted that, the process of ascertaining and authenticating the true and genuine occupiers, tenants and owners of the premises within Soweto Zone area B was done by the 1st respondent in conjunction with the local committee and the community. However, the petitioners failed to prove that they are the bonafide/genuine residents as the time of relocation and thus they cannot benefit from the Kenya Slum Upgrading project.

Analysis and Determination

33. I have carefully considered the matters raised by the parties through their pleadings and submissions. I have also considered the decisions referred to by the parties. The respondent had identified three issues the petitioners did not identify any issues. On my part I note that the issues that need to be addressed are as follows:
 - a. Whether the petitioners are entitled to unique identification numbers as a result of the enumeration and verification exercise?



- b. Whether the on-going eviction process of the petitioners is unconstitutional?
 - c. Whether the petitioners are entitled to any compensation either as tenants or structure owners?
34. This is an important case and it is one that carry with it great public interest especially on the rights of persons living in urban poor settlements which are referred to as slums. This is because the government has embarked on a slum upgrading program and also a program for affordable housing. The areas which are targeted for these projects are the ones identified as slums or places with very low-cost houses. I have had the opportunity to study the petition, the pleadings, accompanying affidavits, submissions as well as the documentation annexed for and against this petition.
35. In Kenya I am aware that there is no legal framework that has been developed to guide evictions as was observed by Justice Lenaola as he then was in the case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 others* Petition 65 of 2010. In this case, the court held at paragraphs 81-84 while relying on the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)* that:
- “The guidelines *inter alia* place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized in law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law.”
36. Judge Lenaola (as he then was) in the same case lamented that :
- “...the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands. Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. I believe time is now ripe for the development of eviction laws and the same sentiments were also expressed by Musinga J. (as he then was) while considering the issues in this matter at an interlocutory stage, where he stated as follows;
- “The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto”.
37. The respondent in its submissions has made contended that this slum upgrading programme is a collaborative initiative between the Kenyan government and the UN Habitat. The government has been tasked with the task of providing decent housing for people living and working in slums and informal settlements in urban areas of Kenya with the sole aim of improving lives and livelihoods. This alone should be reason to celebrate and applaud the government but one cannot lose sight of the fact that the same government is mandated to undertake the exercise recognizing the rights of persons living in the slums and compensating them if and when they have to be moved out of the structures.
38. Kenya's *Constitution* article 43(1) (b), provides that 'every person has the right to accessible and adequate housing and reasonable standards of sanitation'. Despite this very clear provision, Kenyans



suffer insecurity of tenure and are victims of frequent forceful evictions. Jurisprudence on the right to housing, and also on other economic and social rights, remains scarce and scanty. This has a direct implication on how those affected with evictions are treated. Though Kenya has signed onto many of the international conventions on social, economic and cultural rights, housing is still treated as a commodity rather than a right.

39. From the way this process of enumeration and verification was undertaken, the petitioners in this instant suit are not saying that the government should not undertake its program of slum upgrading which to be undertaken in Kibera Soweto and which is projected to house 4000 units in Zone B where the government is working. The petitioners are seeking to be compensated just like the way others who are affected by the slum upgrading program were compensated. The Petitioners have attached the affidavit sworn by Beatrice Minayo a document marked as “SZ B’1” which are photographs supposedly showing numbers plastered on doors during the enumeration exercise.
40. The petitioners have also attached to the affidavit of the Petitioner Beatrice Minayo a document marked as “SZ B’2” what they have termed as a true copy of bank statement showing compensation of one of the beneficiary of the programme by the name James A Anyura. The said beneficiary has sworn an affidavit dated February 4, 2022 in support of the petition stating that he was compensated Kshs 58,000 as facilitation to relocate as structure owner but his tenant one Enos Opieni Anyura who is his tenant and petitioner number 228 has not been facilitated for compensation nor received his unique registration number. He has attached copies of the Unique Identification Card marked as JAA1 and copies of his bank statement as testament to facilitation compensation showing a credit of Kshs 58,000 allegedly from the government to him marked as JAA2.
41. For programs such as this, many cities, particularly in developing countries such as Kenya, have large areas of informal settlements that grew organically, but which often lack structurally sound buildings and services like running water, sanitation and waste management. The traditional approach to upgrading the informal settlements (often called slums) for many years consists of razing and reconstructing without residents’ consent or participation. This approach does not seem to work.
42. In the instant case, it is not in dispute that the community was consulted through structures established by the residents of Kibera Soweto Zone B where the Ministry of Housing and Urban Development representatives, met with the local ad hoc Committee and the Community Members. It is stated by both the petitioner and the respondents that residents were called to meetings on several occasions at Canaan Social Hall in Kibera to discuss matters relating to resettlement. Officials from the Ministry of Housing and Urban Development, the Local Committee and the Community actively engaged the citizens in consultations that were later to be used for enumeration and verification. It was at these meetings that the consulting teams agreed on the facilitation for both the structure owners at Kshs 68,000 and the tenants at Kshs 58,000.
43. For much of the 20th century, governments through their cities have managed slum upgrading with little or no consultation with residents themselves. Many governments through their cities’ preferred solutions to fixing deteriorating slum conditions and affordable housing shortages by simply knocking slums down and rebuilding in the most cost-effective way possible, usually on the city’s outskirts. But this practice doesn’t consider residents’ sense of home and place, their employment and social networks, the availability of basic services, and in general, does not actually improve affordable housing options. In such cases, residents often need to spend more on transport and on coping with gaps in services.
44. In this case however, from the evidence placed before the court, there were consultative meetings held between the Ministry of Housing and Urban Planning, the Local Ad Hoc Committee and the



Community. At a meeting held on November 6, 2019 the project affected persons agreed to voluntarily move out of the site by November 30, 2019. The respondent contends that the clearance of the site and demolition of structures was done voluntarily by tenants and owners of structure who are directly affected by the slum upgrading program and therefore there was no unlawful evictions that were carried out.

45. The petitioners on their part have stated that the persons affected with the project both landlords and tenants were consulted and they agreed be compensated and the figures agreed upon was Kshs 68,000 and Kshs 58,000 respectively. At the time of bringing this petition to court, evictions had already started taken place. The process of compensation is still ongoing. The petitioners are however apprehensive that they have been left out of the compensation program and they have also not been considered as persons affected by the slum upgrading program since they have not been issued with unique identification numbers and cards.
46. On his part, the respondent contends that during the last meeting in November it was agreed that only genuine PAPs holding unique cards would be compensated and so far 3387 beneficiaries have been paid and the remaining 522 have been asked to provide the requisite identification documents to facilitate their payments. Meaning that payment is ongoing and it is the responsibility of all those claiming to be compensated to provide proof.
47. Judge Odunga (as he then was) in the case of *Kepha Omondi Onjuro & others v Attorney General & 5 others* [2015] eKLR addressed himself to the United Nations Basic Principles and Guidelines on the position in regard to development based evictions and settlement 2007 which form part of constitutional provisions of Kenyan law with regard to threshold to be observed prior to evictions as follows:

Prior To Evictions

Urban or rural planning and development processes should involve all those likely to be affected and should include the following elements:

- a. appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives;
 - b. effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups;
 - c. a reasonable time period for public review of, comment on, and/or objection to the proposed plan;
 - d. opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options;
 - e. holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.
38. States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement



cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate.

39. During planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and vulnerable and marginalized groups, and, when necessary, through the adoption of special measures or procedures.
40. Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare.
41. Any decision relating to evictions should be announced in writing in the local language to all individuals concerned, sufficiently in advance. The eviction notice should contain a detailed justification for the decision, including on: (a) absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions. All final decisions should be subject to administrative and judicial review. Affected parties must also be guaranteed timely access to legal counsel, without payment if necessary.
42. Due eviction notice should allow and enable those subject to eviction to take an inventory in order to assess the values of their properties, investments and other material goods that may be damaged. Those subject to eviction should also be given the opportunity to assess and document non-monetary losses to be compensated.
43. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. The State must make provision for the adoption of all appropriate measures, to the maximum of its available resources, especially for those who are unable to provide for themselves, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available and provided. Alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted.
44. All resettlement measures, such as construction of homes, provision of water, electricity, sanitation, schools, access roads and allocation of land and sites, must be consistent with the present guidelines and internationally recognized human rights principles, and completed before those who are to be evicted are moved from their original areas of dwelling.
48. The question then is Whether the petitioners are entitled to unique identification numbers as a result of the enumeration and verification exercise? The Petitioners have not disputed that they participated in all the meetings that addressed the issue of enumeration and verification that finally led to issuance of the unique identification numbers. This means that all those involved in the slum upgrading program held consultative meetings throughout the period of identification upto the time they agreed on the timeframe of moving out of the site and have it corded in readiness for the upgrading.
49. The petitioners have however averred that despite their doors being plastered with special numbers and their being asked to pose for photographs with numbers on their chests as a result of their being enumerated they have been left out of the compensation process to enable their facilitation for



resettlement. That they have been discriminated against by the respondents and their right to property has been violated.

50. Despite the claims made by the petitioners, one has to ask themselves whether the petitioners herein have placed before the court any evidence that same were ever enumerated and thereby assigned any special numbers that were plastered against their doors, either as alleged or at all. In this regard, if any such numbers were ever plastered against the petitioners doors, nothing would have been easier than for the petitioners to say my number was so and so. None of the petitioners have mentioned their numbers instead they have attached documents of numbers of doors which cannot be attributed to any of them. It is therefore difficult to attribute these numbers nor pictures to them.
51. On the other hand, the petitioners herein have also contended that after the enumeration exercise, same were invited to attend a meeting at Cannan Hall, involving the officials from the Ministry of Housing and Urban Development, as well as members of the local community and ad hoc committee and that during the said meeting, same were asked to pose for photographs with the special numbers against their chest. In my humble view, such photographs, if any, would also have been helpful, in ascertaining whether or not the petitioners herein were duly enumerated.
52. Notwithstanding the foregoing, it is also worthy to note that the process in question was being conducted by the Ministry of Housing and Urban Development, in consultation with the local community and in this regard, the petitioners herein could very well procure a letter and/or document from the local committee and/or even the area chief to confirm the fact that same are residents of Soweto Zone B, in the manner claimed.
53. It is worthy to recall that the petitioners herein attached three documents to their supporting affidavit but the attached documents do not support their averment and therefore do not prove and/or vindicate the claims made by the petitioners or at all. For example, the affidavit of James Anyura Anyura who avers that he is a structure owner/landlord and even attaches a copy of his bank statement fails to attest to why as a structure owner he was not paid Kshs 68,000 as was agreed at the meeting instead he was paid Kshs 58,000 as a tenant to facilitate his moving out the suit property. This shows how hard the petitioners are struggling to prove that they were not compensated but they are using evidence that creates a wide berth to their claim.
54. The burden of proof lies in this matter lies with the petitioners to prove their claim on a balance of probability, before the respondents are called upon to rebutt the allegations that has been proven, established and/or laid against same. In support of the foregoing position, I can do no better than to adopt and rely on the decision in the case of *Dr Samson Gwer & 5 others v Kenya Medical Research Institute (KEMRI) & 3 others* [2014] eKLR, where the Supreme Court observed as hereunder;
 - (47) It is a timeless rule of the common law tradition $\frac{3}{4}$ Kenya's juristic heritage $\frac{3}{4}$ and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.
 - (48) The petitioners' case is set around constitutional right of freedom from discrimination (*Constitution of Kenya, 2010*, article 27). It is already the standpoint of this court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous



individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.

(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

55. In the subject matter, the burden of proof was on the petitioners to place before the court sufficient material to establish and to authenticate that indeed same were lawful and legitimate beneficiaries of the slum upgrading project, but in the end no scintilla of evidence was placed before the court.
56. The statutory threshold for evidence is sections 107 and 108 of the *Evidence Act*, chapter 80, Laws of Kenya. I have however noted that the evidence put before the court by the petitioners has fallen below the established threshold. Consequently, the petitioners are therefore not entitled to receiving the unique number and card because there is no evidence showing that they deserved to receive the unique number and card.
57. Further, the process towards the enumeration and verification was undertaken jointly by the Ministry of Housing and Urban Development, in conjunction with the local Committee and the community. From the foregoing, it is not lost to one that the process was labor intensive and required visiting the ground and consulting various stakeholders, including the provincial administration, the local committee as well as the local community, before ascertaining who are truly the genuine structure owners/ land lords and the tenants who were to benefit from the project.
58. Consequently, this being a court of law, the mandate of the institution of the court is limited and circumscribed. Therefore, the court not being inquisitorial, it cannot inquire into who is and/or is not a true tenant, occupier and/or legitimate beneficiary of the slum upgrading process, either in the manner proposed by the petitioners or at all.
59. Given the foregoing, it is therefore my finding and holding that other than the fact that the petitioners did not supply and/or avail to the court adequate evidence to show that same were residents and/or occupiers and/or tenants of the subject area of concern, same have similarly failed, to lay before the court evidence, to enable the court establish whether or not the petitioners ought to be issued with the unique identification numbers.



60. On whether the on-going eviction process of the petitioners is unconstitutional? in this petition reference is made to articles 1, 19, 20, 22, 23, 27, 40, 47, 48, 50, 65, 159 and 165 of *Constitution*. From the information before the court, the petition does not plead which provisions of *Constitution* were breached and/or violated and how the same had been violated. In the absence of such specificity the respondents would not be in a position to answer to the allegations of breach of *Constitution*. The petition as pleaded is deficient and cannot satisfy the requisite constitutional threshold necessary for a constitutional petition. It can never be enough to merely enumerate various constitutional provisions alleged to have been violated in the heading of the petition and leave it at that. The pleadings should set out the particulars of the alleged violations relating the same to constitutional provisions said to have been violated. That is what distinguishes a constitutional petition from a normal suit. Muchemi, J in the case of *David Gathu Thuo v Attorney General & another* (2021) eKLR stated as follows:-

“The articles of *Constitution* which entitles rights to the petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularised in a precise manner. Furthermore, the manner in which the alleged violation were committed and to what extent must be shown by way of evidence based on the pleadings”

61. Therefore, the current petition falls short of the threshold established in the in the case of *Anarita Karimi Njeru v Republic* (1979) eKLR where the court stated as follows:

“...if a person is seeking redress from the High Court on a matter which involves a reference to *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be ingraind.”

62. From the evidence presented, the petitioners has not demonstrated that the on-going eviction is unconstitutional and has been a threat and that constitutional rights of the petitioners have been contravened by the respondents. The court is satisfied that petitioners were consulted and did participate in process of enumeration and verification of genuine members of the slum upgrading program. The petitioners did not also present any evidence of forced evictions.

63. The last issue is whether the petitioners are entitled to any compensation either as tenants or structure owners? Both the petitioners and the respondents are not in dispute that the tenants and structures owners after discussions with local ad hoc committee, Ministry of Housing and Urban Development and the local community agreed on the figures of compensation to facilitate the tenants and structure owners, Ksh 58,000 and Kshs 68,000 respectively. It is however not for the court to direct that the petitioners are entitled to compensation. As already stated, the process of compensation is participatory and involves many stakeholders. Further there is an established system of enumeration of the persons affected by the project and a verification process that then leads to compensation by those affected being facilitated. Since the process is ongoing, the court will direct that the petitioners subject themselves to this elaborate process involving many other stakeholders. The established consultative structure has capacity to identify the genuine people to be compensated.

64. Finally, I must say something about the petitioners’ claim of violation of article 47 on the right to fair administrative action. The court takes the view that this is a claim without merit. As can be observed from the deposition by the petitioners and even the respondents, it is not in dispute that this was and still is an inclusive process that involved consultation with the petitioners and others on the relocation and resettlement plan in place. Even though the respondents should note that the relocation



should respect the international conventions that Kenya is a signatory too already mentioned above on resettlement of slum dwellers as they undertake the slum upgrading program.

65. In my view the petitioners wrongly invoked this court's constitutional jurisdiction. There is no competent constitutional petition before the court as it falls far short of the threshold established in the *Anarita Karimi Njeru case* (supra). Consequently, taking all the above matters into account, I find no merit in the present petition. It is therefore hereby dismissed. However, notwithstanding the lack of merit on the part of the petitioners, I will not burden them with costs. It is my order therefore that each party bears its own costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2022.

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MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Mr Mokaya for the Petitioners

No appearance for the Respondents

Ms. Caroline Sagina : Court Assistant

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MOGENI J

JUDGE

