



Kavirondo Community Based Organization v Attorney General & 2 others (Constitutional Petition E021 of 2021) [2022] KEELC 15063 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15063 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CONSTITUTIONAL PETITION E021 OF 2021
A OMBWAYO, J
NOVEMBER 24, 2022
IN THE MATTER OF ARTICLES 63 OF THE KENYAN
CONSTITUTION
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF
RIGHT AND FUNDAMENTAL FREEDOM UNDER
ARTICLE 63

BETWEEN

KAVIRONDO COMMUNITY BASED ORGANIZATION PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF WATER, SANITATION AND NATIONAL WATER

HARVESTING 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

JUDGMENT

Brief Facts

1. The petitioner herein vide their petition dated October 7, 2021 and filed in court on October 8, 2021 is seeking orders that this honourable court be pleased to order that the petitioner being the legitimate and the owner of the swarth of land from Kibos-Fort Tenan (Koru Soin Dam inclusive) that is intended to contracted be reverted back to them.



2. The petitioners further seek that this court be pleased to order a permanent injunction restraining the Koru Soin Dam and a declaration that the areas to be covered by Koru Soin Dam be declared as part of the petitioners community land.
3. The petitioner further seeks a declaration that the swath land from Kibos to Fort Ternan be transferred to the petitioner.
4. Lastly, the petitioner seeks general damages that must have occurred to the petitioner by loss of user of its land and mense profits plus cost of the suit.
5. The petitioner is a community which is clearly defined group users of land identified on the basis of ethnicity, culture or similar community of interest as provided under article 63 (1) of the Kenyan Constitution which holds a set of clearly defined rights and obligation over land and land based resources. That the petitioner is the legitimate owner of parcels of land occupied by Koru Soin Dam that is intended to be constructed by the Government through the 2nd respondent.
6. It is the petitioner's case that the large swath of the land from Kibos to the Nandi Escarpments of Kenya all the way to Fort Tenan belonged to them before the advent of the colonialist until the day of independence in 1963. That the then British High Commissioner has since referred the petitioner to the Government of Kenya as they saw no reason why the land in question was not reverted to the Petitioner.
7. The petitioner has alleged that between 1902-1910 the petitioner's King named Kitoto Chama granted the Imperial British East African Company (IBEACO) the right to have extended the white settlement from Fort Tenan to Kibos as earlier white farmers settlements stretched from Kiu in (Kamba) to Fort Tenan which swath of land was later held by the Governor of Kenya up to independence in 1963. That upon getting independence, the Kenyan Government did not revert the swath suit land to the Petitioner and instead the white settlers land was unilaterally given away or sold to the Luo Nyanza without approvals of Parliament.
8. It was stated that the Luos were settled in Kibogori North and Kibogori South Settlement Schemes and Muhoroni Settlement Schemes and therefore the petitioner lost their land, a case of blatant historical land injustice and impunity. That the petitioner petitioned the IIBRC and TJRC on the historical land injustice and claimed that the suit property be reverted to them.
9. The respondents have failed to file a reply to the petition and when this matter came up for mention on May 17, 2022 before me, I directed parties to file written submissions have perused the file and parties herein failed to file their written submissions.

Analysis and Determination

10. The petitioner has stated in its petition that it is the legitimate owner of respective parcels of land that are occupied by the Koru Soin Dam that is intended to be constructed by the 2nd respondent herein. That the petitioner's king granted the Imperial British East African Company (IBEACO) the right to have extended the white settlement from Fort Tenan to Kibos which land was later held by the Governor of Kenya upto independence and upon independence the suit parcels of land did not revert to the petitioner. It is also the petitioner's case that failure of the suit parcel of land to revert to the community amounted to historical injustice. I have taken note that the petitioner filed this petition without a supporting affidavit.
11. Section 15 (1) of the National Land Commission Act provides that pursuant to article 67 (3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice



complaints and recommend appropriate redress. A historical land injustice is defined in section 15(2) of the *National Land Commission Act* to mean a grievance which was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between June 15, 1895 when Kenya became a protectorate under the British East African Protectorate and August 27, 2010 when the *Constitution* of Kenya was promulgated; has not been sufficiently resolved and subsists up to the period specified under paragraph; meets the criteria set out under subsection 3 of this section.

Section 15(3) of the Act provides as follows;

- "(3) A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria—
- (a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;
 - (b) the claim has not or is not capable of being addressed through the ordinary Court system on the basis that—
 - (i) the claim contradicts a law that was in force at the time when the injustice began; or
 - (ii) claim is debarred under section 7 of the Limitation of Actions Act, (Cap 22) or any other law;
 - (c) the claimant was either a proprietor or occupant of the land upon which the claim is based;
 - (d) no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and
 - (e) it is brought within five years from the date of commencement of this Act.
- (4) A claim alleging historical land injustice shall be permissible if it was occasioned by—
- a. colonial occupation; -
 - b. independence struggle;
 - c. pre-independence treaty or agreement between a community and the Government;
 - d. development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land;
 - e. other form of remedy was provided, including conversion of non-public land into public land;
 - f. inequitable land adjudication process or resettlement scheme;
 - g. politically motivated or conflict-based eviction;
 - h. corruption or other form of illegality;



- i. natural disaster; or
- j. other cause approved by the Commission."

12. Section 15 (5) and (6) of the [National Land Commission Act](#) further provides that:

- "(5) When conducting investigations under subsection (1) into historical land injustices the Commission may—
- (a) request from any person including any government department such particulars, documents and information regarding any investigation, as may be necessary; or
 - (b) by notice in writing, addressed and delivered by a staff of the Commission to any person, direct such person, in relation to any investigation, to appear before the Commission at such time and place as may be specified in the notice, and to produce such documents or objects in the possession, custody or under the control of such person and which are relevant to that investigation.
- (6) Where a complainant is unable to provide all the information necessary for the adequate submission or investigation of a complaint, the Commission shall take reasonable steps to have this information made available."

13. Pursuant to a letter dated August 11, 2020 from the National Land Commission, the same indicated that the community had been pursuing a historical land injustice claim at the Commission and the matter was being considered. The Commission also stated in its letter that any complaints over acquisition of land for the construction of the dam will be handled once public inquiry sessions begin.

14. I have looked at the petition and do find that the petitioner has not clearly stated whether the suit property has been compulsorily acquired by the Government. Based on the various correspondences that the petitioner has annexed, it is clear that the process of public inquiry has not commenced and it is also clear that the National Land Commission is yet to issue a public notice where the community and members of the public will be invited to present their case.

15. This court is of the view that the petitioner has not clearly stated how their rights have been infringed as was held in [Anarita Karimi Njeru v Republic](#) (No1)-[1979] KLR 154 where the court stated as follows:

"... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." (see also [Meme v Republic & another](#) [2004] 1 KLR 637)

16. The Court of Appeal in [Mumo Matemo v Trusted Society of Human Rights alliance](#) [2014] eKLR, stated that:

"...the principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give



fair notice to the other party. The principle in Anarita Karimi Njeru (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

In the case of Christian Juma Wabwire v Attorney General [2019] eKLR, the Judge relied on the decision in Lt Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No 128 of 2006 where it was held that:-

It is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the Petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened.....”

The learned judge proceeded to hold as follows: -

“I am alive to the fact, that the petitioner in his petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought.”

18. This court is guided by the above case laws and therefore do find that the petition lacks merit and is hereby dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022.

A.O OMBWAYO

JUDGE

