



Sila & 6 others v International Centre for Insect Physiology and Ecology (ICIPE) & 2 others (Petition 01 of 2021) [2022] KEELC 15140 (KLR) (6 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
PETITION 01 OF 2021
GMA ONGONDO, J
DECEMBER 6, 2022
(FORMERLY MIGORI PETITION NO. E027 OF 2021)**

BETWEEN

**LUKIO OGINI SILA 1ST PETITIONER
SAMSON MAENDE 2ND PETITIONER
OGALO SEWE 3RD PETITIONER
MOSES OTIENO OMOLO 4TH PETITIONER
ODERO JOSEPH OYUGI 5TH PETITIONER
TOM MBOYA ODHIAMBO 6TH PETITIONER
KENNEDY OCHIENG ONYANGO 7TH PETITIONER**

AND

**INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY AND ECOLOGY
(ICIPE) 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT**

JUDGMENT

1. By an amended petition dated October 25, 2021 and filed on November 8, 2021 and instituted in accordance with the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) as read with section 13(2) and (3) of the [Environment and Land Court Act, 2011](#), the petitioners, represented by G S Okoth and Company Advocates, are seeking the orders *infra*;



- a. The honourable court do exercise its powers of enforcement of constitutional rights of the petitioners by ordering that the petitioners be each paid adequate and full compensation for their parcels of land on which the station of the defendant has been established.
 - b. The honourable court be pleased to make an order of declaration to the effect that:
 - a. Fundamental rights to property of the seven petitioners and their dependents as has always been enshrined in the [Constitution of Kenya](#) have been violated by the agents of the state and the defendant has failed to fulfill her obligations under the [Constitution](#).
 - b. The 1st respondent is liable to compensate the petitioners for the aforementioned violations of his constitutional rights.
 - c. The respondents do pay damages appurtenant to such violations.
 - c. The honourable court be pleased to condemn the respondents to pay the costs of this petition to the petitioners.
 - d. The honourable court do make such other or further orders as the court deems just.
2. The petition is anchored on the supporting affidavit of fifteen (15) paragraphs sworn on even date by Tom Mboya Odhiambo, the 6th petitioner herein and the accompanying documents, namely: a letter of authority to act in a suit, a table of donors of ICIPE land, a copy of the Kenya Gazette dated December 7, 1979, copy of Sunday Nation newspaper dated July 19, 2020, a copy of demand letter to the 1st respondent dated August 24, 2020, a copy of response to demand letter dated September 9, 2020, copy of letters to the Land Adjudication Officer, copies of introduction letters from the Chief of West Gembe location as well as copies of limited grants of letters of administration in respect to the estates of the 4th, 5th, 6th and 7th petitioners (marked as exhibit TMO-1 to 12D respectively).
 3. In brief, the petitioners' lamentation is that the suit land now registered as Land Parcel No Kasgunga/Kamreri/2097 adjudication section in the name of the 1st respondent, was originally the cultural land of the Usare clan especially the families of Sila Odero, Mathayo Oyugi and Osewe Ogonya, all deceased now numbering approximately 40 families. That the 1st respondent acquired the suit land through compulsory acquisition but did not compensate the original owners in contravention of article 40(3) of the [Constitution of Kenya, 2010](#).
 4. The 3rd respondent through Caroline Khasoa Advocate, opposed the petition by way of grounds of opposition dated June 15, 2022 and duly filed herein on June 20, 2022. The 3rd respondent contends that this court lacks jurisdiction to entertain the instant petition as the purported acquisition of the suit land occurred in the year 1979. That the claim is time barred. That under article 68 of the [Constitution of Kenya, 2010](#), this court is not the forum of first instance for resolution of historical land injustices. That further, the 3rd respondent is wrongly enjoined as the same did not exist when the cause of action arose. The 3rd respondent also stated that the petitioner has not attached any pleadings from the [Land Acquisition Act](#) and Land Acquisition Tribunal whose aim was to deal with land compensation claims. Thus, the 3rd respondent urged the honourable court to dismiss the instant petition with costs.
 5. The 2nd respondent through learned counsel Sarah A Juma, filed grounds of opposition dated June 20, 2022 on June 21, 2022. It is the 2nd respondent's contention, *inter alia*, that the petitioners have no *locus standi* to bring the claim and that the court lacks jurisdiction to hear and determine the instant petition as the issues raised therein are of the nature of historical land injustice as defined under section 15(2) of the [National Land Commission Act, 2012](#). That therefore, the petitioners ought to



- first exhaust the remedy of lodging a claim with the National Land Commission as prescribed under article 67 (2)(e) of the [Constitution of Kenya, 2010](#) before approaching this court.
6. The 1st respondent did not file any response to the petition herein.
 7. Initially, the petition was lodged at Migori Environment and Land Court. On August 19, 2021, the matter was transferred to this court, upon its establishment, for hearing and determination in the spirit of articles 6 (3), 48 and 159 (2) (b) and (e) of the [Constitution of Kenya, 2010](#).
 8. The petition was heard by way of written submissions pursuant to orders of this court made on June 22, 2022.
 9. Accordingly, the petitioners' counsel filed submissions dated September 22, 2022 on September 27, 2022. Counsel submitted that the grounds of opposition filed by the 2nd and 3rd respondents offend the provisions of rule 15(2) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) (*supra*) as the same were lodged after the expiry of seven months instead of seven days. Thus, the same should be expunged from the record.
 10. Further, the petitioners' counsel submitted that the suit land originally belonged to the petitioners and their forefathers and was set apart at the instance of the government pursuant to section 7 of the [Trust Land Act](#). However, they were not compensated as envisioned under section 8 of the same Act. Learned counsel also submitted that the only function of the National Land Commission is to process and pay appropriate compensation. That pursuant to section 15 (3) (e) of the [National Land Commission Act](#), the commission only admits claims if made within 5 years from the date of commencement of the Act, which period has already lapsed. Counsel relied on the case of [Safepark Limited –vs- Henry Wambega & 11 others](#) (2019) eKLR, to fortify the submissions.
 11. The 2nd respondent's counsel filed submissions dated October 3, 2022 on October 4, 2022. Counsel submitted that the petitioners have not shown any nexus between their fore fathers and the suit land, thus the court should not grant their request for interlocutory judgment as their claim is unverifiable. That the petitioners have not produced any documentation proving that their forefathers gave up the suit land and were required to be compensated. Counsel further submitted that the law provides a mechanism for redress of historical injustices, which mechanism has not been exhausted by the petitioners. Learned counsel relied on various authorities, including the case of [Henry Wambega & 733 others –vs- Attorney General & 9 others](#) (2020) eKLR, to buttress the submissions.
 12. The 1st and 3rd respondents did not file any submissions herein.
 13. I have anxiously studied the entire petition, the 2nd and 3rd respondents grounds of opposition and the petitioners' and 2nd respondent's submissions. In that regard, the following issues fall for determination:
 - a. Whether this court has jurisdiction to hear and determine the instant petition.
 - b. If the answer to (a) is in the affirmative, whether the petitioners are entitled to the remedies sought in the petition.
 14. It is important to note that this court is empowered by article 162 (2) (b) of the [Constitution of Kenya, 2010](#) as well as section 13 of the [Environment and Land Court Act, 2015](#) (2011), to hear and determine constitutional petitions; see also [United States International University –vs- the Attorney General and 2 others](#) (2012) eKLR.



Whether this Court has Jurisdiction to Hear and Determine The Instant Petition.

15. The 2nd and 3rd respondents contend that this court does not have jurisdiction to determine historical land injustices. That the 3rd respondent has mandate to address historical injustices. Thus, the first port of call for historical injustice claims should be the 3rd respondent. Counsel for the 2nd and 3rd respondents referred to section 15 of the [National Land Commission Act, 2012](#).

16. The Court of Appeal in the case of [Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others](#) (2018) eKLR pronounced itself as follows regarding jurisdiction:

"75. On the question whether a court should await investigations and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. Our conviction stems from a reading of article 67(2) (e) of the Constitution. the article provides that the NLC can investigate "present or historical" land injustices. We lay emphasis on the word "present." If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Court redundant. We do not think this was intended to be so. Our view is fortified by section 15(3)(b) of the National Land Commission Act which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

76. Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice..." (Emphasis added)

17. Therefore, I endorse the reasoning of my learned brother Munyao J in the case of [Henry Wambega & 733 others v Attorney General & 9 others](#) (*supra*) where he stated thus:

"I think the issue of jurisdiction is settled. This court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a court is vested with jurisdiction, does not mean that in all cases the court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction." (Emphasis added)

18. The honourable court went ahead to state as follows:

"...the NLC has wide jurisdiction on historical injustices. I would say that when it comes to the choice of filing a claim before the NLC or before the court, one needs to make an assessment of what task is required. If the facts are contested, the number of persons elaborate and not easy to verify them, and where a thorough investigative process is going to be needed, then probably the court would not be the best forum and it would be best



that the NLC handles the matter. If a person files such suit in court, the court, on being moved, or on its own volition, can refer the matter to the NLC for determination, rather than dismissing it outright. However where facts are clear, the issues uncontested, and what is needed is for the court to determine the rights violated and the nature of redress, or the legal rights of the parties, then a court is at liberty to entertain the suit and determine it on its merits...”

19. In the instant case, the petitioners lament that the suit land was originally the cultural land of the Usare clan especially the families of Sila Odero, Mathayo Oyugi and Osewe Ogonya (all deceased now numbering approximately 40 families). That the 1st respondent acquired the said land through compulsory acquisition but did not compensate the original owners who were their forefathers. Therefore, the petitioners have opted to come to court.
20. On the other hand, the 2nd respondent contends that the instant petition being a matter of public interest, it should be accorded more time to trace all the documentation pertaining setting apart of parcels for the 1st respondent that will confirm whether the petitioners’ fore fathers were the owners of the suit land in the first instance. That the said forefathers were involved in the transaction.
21. Indeed, the court’s jurisdiction is not for fact-finding but enforcement and establishment of rights as stipulated under article 23 of the [Constitution of Kenya, 2010](#).
22. The [Constitution of Kenya, 2010](#) at article 67 (2) (e) does provide that one of the functions of the 3rd respondent is “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.” This function was embodied in section 15 of the [National Land Commission Act](#). The process of doing so was elaborated through the [Land Laws \(Amendment\) Act, 2016](#), which commenced on September 21, 2016. The Act provides that a historical land claim may only be admitted, registered and processed by the Commission if it is brought within five years from the date of commencement of the Act.
23. So, this court cannot make a determination on the instant petition before all the facts are established by the National Land Commission. It is the considered view of this court that there has been no inordinate delay on the part of the petitioners. Besides, the instant petition was lodged on November 8, 2021 hence, the delay is excusable in the circumstances.
24. Thus, this petition is hereby referred to the National Land Commission for determination in line with section 15 of the [National Land Commission Act, 2012](#) as pointed out at paragraph 22 hereinabove.

Costs of the Petition

25. The proviso to section 27(1) of the [Civil Procedure Act](#), chapter 21 laws of Kenya provides that costs follow the event within the discretion of the court. By the character of the petition, this court would be loathe to award costs to the parties herein.
26. Orders accordingly.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF DECEMBER, 2022.

G M A ONGONDO

JUDGE

Present

1. Ms. Odhiambo holding brief for Mr. G. S. Okoth, learned counsel for the petitioners



2. Ms. Okong'o holding brief for Ms. S. Juma, learned counsel for the 2nd respondent
3. Okello, Court Assistant

