



**Republic v National Land Commission & another; Maende & 6 others
 (Exparte); International Centre for Insect Physiology and Ecology (ICIPE)
 (Interested Party) (Environment and Land Case Judicial Review Application
 E002 of 2023) [2024] KEELC 1301 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1301 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
 ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E002 OF 2023**

GMA ONGONDO, J

MARCH 6, 2024

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE LAND SETTLEMENT FUND BOARD OF TRUSTEES .. 2ND RESPONDENT

AND

SAMSON MAENDE EXPARTE

OGALO SEWE EXPARTE

LUKIO OGINI SILA EXPARTE

MOSES OTIENO OMOLO EXPARTE

ODERO JOSEPH OYUGI EXPARTE

TOM MBOYA EXPARTE

KENNEDY OCHIENG ONYANGO EXPARTE

AND

**THE INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY AND
 ECOLOGY (ICIPE) INTERESTED PARTY**



JUDGMENT

1. At the outset, it is observed that leave to apply for an order of Mandamus against the respondents was granted to the Ex parte applicants (The applicants herein) by this court on 2nd August 2023 pursuant to their application by way of Chamber Summons dated 12th July 2023.
2. Wherefore, the applicant through the firm of G.S Okoth and Company Advocates generated a Notice of Motion dated 9th August 2023 (The application herein) seeking the orders infra;
 - a. The Honourable Court be pleased to issue an order of Mandamus directed at the National Land Commission Compelling the Chairman of the above respondent to initiate investigations into the historical injustices that led to the lands of the applicants being compulsorily acquired for the establishment of the International Centre for Insect Physiology and Ecology (I.C.I.P.E) without paying the applicants and their forefathers the due prompt and adequate compensation in consideration of the compulsory acquisition of the land now registered as Land Parcel No. Kasgunga/Kamreri/2097 and estimated at Kshs. 488,000,000/- and thereafter make appropriate recommendations to be registered in the names of the applicants.
 - b. The costs of the application be awarded to the applicants.
3. The application is premised upon the verifying affidavit of nine paragraphs sworn on 12th July 2023 by the 6th applicant duly instructed and authorized by the other applicants together with copies of documents marked as “TMO-1” to “TMO-4” including the other applicants’ authority and the court’s judgment annexed to the affidavit. Also, the application is founded upon grounds (a) to (e) stated on the face of it. Briefly, the applicants’ lamentation is that the respondents have failed to determine their claim as disclosed by an amended Constitutional Petition dated 25th October 2021 which was referred to the 1st respondent in consonant with section 15 of the National Land Commission (NLC) Act, 2012 by this court’s judgment rendered on 6th December 2022. That the claim is still unsettled and the respondents’ failure to comply with the court’s judgment amounts to an abuse of the court process.
4. In the verifying affidavit at paragraphs 6 and 7, the applicants deposed;
 - (6) That we have reached out to the respondent to chair a meeting and discuss the issue of compensation and even forwarded the said judgment to them but the respondents have refused to take any action as regards the matter to -date hence this application.
 - (7) That the respondents have shown in their action that they are not willing to have us compensated unless they are compelled to do so.
5. The applicants’ counsel served the application on the respondents and the interested party as revealed in affidavits of service sworn on 2nd October 2023 and 15th February 2024.
6. The Hon. Attorney General filed a memorandum of appearance dated 15th February 2024 in this matter.
7. Besides, the respondents and interested party neither entered appearance nor responded to the application.
8. On 5th December 2023, the court directed that the application be heard by written submissions.



9. Consequently, learned counsel for the applicants filed submissions dated 22nd December 2023 referring to the application and that the same was duly served on the respondent and interested party who did not enter appearance nor file a response to it. Counsel identified twinned issue for determination namely whether the respondents are legally mandated to investigate historical land injustices and whether orders of mandamus can issue in the circumstances of the subject matter. In support of the application, counsel cited Article 67 (2) (e) of *the Constitution* of Kenya, 2010 on the functions of the 1st respondent and the case of National Examination Council-vs-Republic Ex parte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR, among others.
10. The respondents and the interested party did not file submissions in this case.
11. I have taken into account this application in entirety as well as the applicants’ submissions and the fact that there is no response to the application. So, are the applicants deserving of the orders sought in the application?
12. It is important to observe that in the Black’s Law Dictionary 10th Edition, the term “Mandamus” the main relief sought in the application, means;

“A writ issued by a court to compel performance of a particular act by a lower court or a government officer or body, usually to compel a prior action or failure to act.”
13. Article 22 of *the Constitution* of Kenya, 2010 provide for enforcement of Bill of Rights. In any proceedings brought under the said Article, the court may grant appropriate relief, including mandamus which is an order of judicial review as stated in Article 23 (3) (f) of the same Constitution.
14. Article 67 (2) (e) of *the Constitution* of Kenya, 2010 sets out the functions of the National Land Commission which include; to initiate investigations, on it’s own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress This function is operationalized by section 15 of the *National Land Commission Act* No. 5 of 2012.
15. It must be noted that where there is clear procedure of redress of any particular grievance, the same to be adhered to since there are good reasons for such special procedures; see Speaker of the National Assembly-vs- James Njenga Karume (1992) KLR 21.
16. Similarly, in Geoffrey Muthinja Kabiru & 2 others-vs-Samuel Muguna Henry & 1756 others (2015) KLR, the Court of Appeal held;

“.....Courts ought to be fora of last resort and not the first port of call the moment a storm brews. The exhaustion doctrine is a sound one and serves the purpose.....”
17. In this court’s judgment delivered on 6th December 2022 (TM0-3) annexed to the verifying affidavit, the 1st respondent is to establish all the facts of this dispute in the first instance as stipulated at section 15 of the *National Land Commission Act*, 2012 and held in Speaker of the National Assembly and Geoffrey Kabiru cases (supra). Clearly, the same has not been carried out herein.
18. It is well settled that a party to a matter must be made aware of the existence of the same; see Ogada-vs-Mollin (2009) KLR 620.
19. The respondents were to be made aware of the existence of the applicants’ complaint for action. There is no revelation that a letter dated 26th January 2023 by the applicants’ counsel addressed to the 1st respondent’s counsel annexed to the application, was ever served on the respondents thereof.



20. It is trite law that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof; see *Kirugi and another-vs-Kabiya & 3 others* (1987) KLR 347 and *Eastern Produce (K) Ltd-Chemoni Tea Estate-vs-Bonfas Shoya* (2018) eKLR.
21. This application was not defended. Indeed, the respondents were not duly served with the applicants' complainant. Thus, the respondents were not given an opportunity to hear the complaint for appropriate action.
22. In the final analysis, the present application is misconceived and not proved to the requisite standards. Therefore, the applicants are not entitled to the prayers in the application.
23. A fortiori, this application, be and is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT HOMA BAY THIS 6TH DAY OF MARCH 2024

G.M. A ONG'ONDO

JUDGE

PRESENT;

- a. P. Odhiambo learned counsel for the applicants
- b. Sarah Juma learned counsel for the respondents
- c. T. Luanga, court assistant

