



**Adeba & 17 others v National Land Commission & 4 others; Nairobi
City County (Interested Party) (Environment & Land Petition
E006 of 2024) [2024] KEELC 5929 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5929 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E006 OF 2024

JO MBOYA, J

SEPTEMBER 16, 2024

**IN THE MATTER OF: ART.22(1) & (2) OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF: ARTICLES 10,19,20,21,22,23,24 AND
25 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT,2012

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE
27,40,47,50,60(1)(B),232 & 249 OF THE CONSTITUTION OF KENYA**

BETWEEN

AZULU WASWA ADEBA 1ST PETITIONER
PETER MWENJE MAINA 2ND PETITIONER
PATRICK CHIBOLE WERE 3RD PETITIONER
TOM SIOYI KITUI 4TH PETITIONER
DISHON INDIMULI ASTIBA 5TH PETITIONER
FRANCIS MWAURA 6TH PETITIONER
DAYO OSMANI 7TH PETITIONER



JOHN KIBIRU NGINGO	8 TH PETITIONER
ROSEMARY MUNYIVA KISYULA	9 TH PETITIONER
THOMAS MIREMBO AFUNDI	10 TH PETITIONER
MARY WANJIKU NJENGA	11 TH PETITIONER
HALIMA IBRAHIM	12 TH PETITIONER
PETER KIIO MUTHIANI	13 TH PETITIONER
JOHN MALWA ATABAJI	14 TH PETITIONER
GODFREY MOSOSI NYAENGA	15 TH PETITIONER
MARY NYAGUTHII MAINA	16 TH PETITIONER
ASMAN LIYAYI MALWA	17 TH PETITIONER
ADEN MOHAMMED	18 TH PETITIONER

AND

NATIONAL LAND COMMISSION	1 ST RESPONDENT
THE CABINET SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT	2 ND RESPONDENT
THE CHIEF LAND REGISTRAR	3 RD RESPONDENT
THE INSPECTOR-GENERAL OF POLICE	4 TH RESPONDENT
THE HON ATTORNEY-GENERAL	5 TH RESPONDENT

AND

NAIROBI CITY COUNTY	INTERESTED PARTY
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JUDGMENT

Introduction And Background

1. The Petitioners have approached the court vide Petition dated the 7th February 2024 and in respect of which same [Petitioners] have sought for a plethora of reliefs.
2. For coherence, the reliefs sought at the foot of the Petition are as hereunder;
 - i. An order of declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and any other residents of the Kiambiu Settlement Scheme in Eastleigh, Nairobi County without according them alternative Shelter and/or accommodation to pave way for the development of Social Housing Units as contained in the advertisement dated 11th of December 2023 in respect to Tender number MLPWHUD/SDHUD/SUD/261/2023-2024 is a violation of their fundamental right to life guaranteed by article 26 (1) and (3) of *the Constitution* of Kenya, 2020 and further contravenes the national values and principals of governance that include human dignity, equity, social justice and need to protect the marginalized as enshrined in Article 10 (2) of *the constitution* of Kenya, 2010.



- ii. An order of Declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kiambiu Settlement Scheme, without any warning, Court Orders, any or reasonable notice in writing or availing, them information regarding the evictions and without according them alternative shelter and/or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by articles 28 and 29 (c), (d) and (f) of *the Constitution* of Kenya, 2010.
- iii. An Order of Declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kiambiu Settlement Scheme, without warning, any or reasonable notice in writing or availing them information regarding the evictions is a violation of their fundamental right of access to information guaranteed by article 35(1) of *the Constitution* of Kenya 2010 and that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kiambiu Settlement Scheme, and the destruction of the building materials and their household goods in the process, without Court order/s and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by article 40(1), (3) and (4) as read with article 21 (3) of *the Constitution* of Kenya.
- iv. An order of Declaration That any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kiambiu Settlement Scheme without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean and safe water in adequate quantities guaranteed by article 43 (1) read with articles 20 (5) and 21 (1), (2) and (3) of *the Constitution* of Kenya 2010 and that any violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kiambiu Settlement scheme, without any Court order/s, warning, any or reasonable notice in writing or availing them information and reasons regarding the demolitions and evictions is a violation of their fundamental right to fair administrative action guaranteed by article 47 of *the Constitution* of Kenya 2010.
- v. An order of declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kiambiu Settlement scheme without according them alternative shelter and/or accommodation is a violation of their fundamental rights to physical and mental health, and the fundamental right to physical and moral health of the family under articles 16 and 18 of the ACHPR read with article 21(6) of *the Constitution* of Kenya 2010.
- vi. An order of declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53 (1) (b), (c), (d) and (2) read together with article 21 (3) of *the Constitution* of Kenya 2010 and article 28 of the ACHPR read with article 2 (6) of *the Constitution* of Kenya 2010.
- vii. An order of declaration that any forcible, violent and brutal eviction through demolition of homes of the elderly persons among the Petitioners without according them alternative



shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit or personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care and assistance from the state guaranteed by article 57 (b) (c) and (d) as read with article 21 (3) of *the Constitution* of Kenya 2010.

- viii. An order of declaration declaring that there was no public participation in formulating and implementation of the decision of the 2nd respondent signified by the tender advertisement in the Standard on the 11th of December 2023 in respect to Tender number MLPWHUD/SDHUD/SUD/261/2023-2024 calling for bids for developing social housing units within Kiambiu Settlement scheme and is in violation of their right to access to information guaranteed by article 35(1) of *the Constitution* of Kenya 2010
 - ix. A permanent injunction restraining the respondents either by themselves, directors, agents, servant, employees or otherwise howsoever from entering, unlawfully, acquiring, taking over possession and constructing structures on all that property known as Kiambiu Settlement Scheme or dealing in the said properties in a manner prejudicial to the petitioners.
 - x. A permanent injunction restraining the respondents either by herself, agents, servants, employees or otherwise howsoever from unlawfully allocating all that parcel known as Kiambiu Settlement scheme to anyone other than the petitioners in a manner prejudicial to the petitioners' interests.
 - xi. An order of certiorari quashing the decision of the respondents to put up social housing units over all that parcel known as Kiambiu Settlement scheme and measuring 59 acres.
 - xii. 13. An order of prohibition barring the respondents from taking over with the intention of putting up Social Housing Units over all that parcel known as Kiambiu Settlement scheme measuring 59 acres in size.
 - xiii. The removal and/or distraction of illegal beacons and/or any other illegal structures purportedly erected on the and /or around the subject properties.
 - xiv. The Respondents to pay costs of the petition.
 - xv. The Honourable court makes any such other or further orders as it may deem fit and expedient in the circumstances to remedy the violation of the petitioner's fundamental rights.
3. The Petition beforehand is anchored on various provisions of *the Constitution*. Furthermore, the Petitioners have highlighted various grounds on the face thereof. In addition, the Petition is also supported by the affidavit sworn by the 1st Petitioner on the 7th February 2024 and a further supporting affidavit sworn by the same Petitioner.
 4. Upon being served with the Petition, the 2nd, 3rd, 4th and 5th Respondents duly entered appearance and thereafter filed grounds of opposition. In particular, the 2nd, 3rd, 4th and 5th Respondents contended that the Petition beforehand is not only premature and misconceived, but same does not disclose any reasonable cause of action or at all.
 5. On the other hand, the 1st Respondent also entered appearance and filed grounds of opposition. For good measure, the grounds of opposition by the 1st Respondent replicate the ones canvassed and highlighted by the 2nd, 3rd, 4th and 5th Respondents.



6. Furthermore, the interested party herein also entered appearance and thereafter filed grounds of opposition dated the 22nd July 2024. Instructively, the interested party contends that the Petition beforehand is misconceived and legally untenable.
7. The Petition came up for directions on the 11th March 2024, whereupon the parties agreed to canvass the Petition on the basis of affidavit evidence and written submissions. In this regard, the court thereafter directed the parties to file and exchange their respective written submissions within set timelines.
8. Suffice it to point out that the Petitioners thereafter proceeded to and filed their written submissions. Furthermore, the 2nd, 3rd, 4th and 5th Respondents, as well as the interested party also filed written submissions. For good measure, the submissions herein form part of the record of the court.

Parties' submissions:

Petitioners' submissions:

9. The Petitioners filed written submissions and in respect of which same [Petitioners] have adopted the grounds contained in the body of the Petition as well as the averments in the supporting affidavit. Furthermore, the Petitioners have thereafter highlighted four [4] salient issues in the body of the submissions.
10. Firstly, the Petitioners have submitted that same have been in occupation of Kiambui Settlement Scheme, which is situated in Eastleigh Section 3 within Kamkunji Constituency. Furthermore, the Petitioners have contended that same have been in occupation of the said parcel of land for more than 50 years.
11. Additionally, the Petitioners have contended that during the period of occupation, the same [Petitioners] have constructed/erected temporary structures which same have used as their houses over a period of time. Furthermore, the Petitioners have also contended that various governments including the government of His Excellency [H.E] Daniel Toroitich Arap Moi [deceased] gave orders directing that the Petitioners be issued with letters of allotment over and in respect of the portions of land under their occupation.
12. The Petitioners have further submitted that arising from the directions by the various governments same [Petitioners] were thereafter issued with letters of allotment and beacons certificates. Nevertheless, the Petitioner have contended that same have not been issued with the formal certificates of lease and/or title despite their endeavours to procure such documents from Nairobi City County Government and National Land Commission, respectively.
13. Be that as it may, the petitioners have submitted that despite lack of formal certificate of lease/title, same [Petitioners] have accrued legitimate rights to and in respect of Kiambiu Settlement Scheme. In this regard, the Petitioners have posited that same therefore have lawful rights and interests over the suit property.
14. Secondly, the Petitioners have submitted that the 2nd Respondent herein has since published an advertisement in the standard newspaper of 11th December 2023 and wherein the 2nd Respondent has invited tenders for the construction of social housing units on the suit property. For coherence, the Petitioners have contended that the invitation for tender was made vide tender No. MLPWHUD/SDHUD/SUD/261/2023-2024.



15. The Petitioners have contended that the tender invitation by and on behalf of the 2nd Respondent was carried out and undertaken without prior notice to and involvement of the Petitioners and the rest of the residents of the suit property. In this regard, the Petitioners have contended that the tender invitation towards and for purposes of the construction of the social housing units was undertaken without due regard to their rights over the suit property.
16. Arising from the foregoing, the petitioners have thus contended that the 2nd Respondent has therefore violated their [Petitioners] right to fair hearing and fair administrative action contrary to and in contravention of the provisions of Article 47 of *the Constitution* 2010.
17. Thirdly, the Petitioners have submitted that even though same [petitioner] have not been issued with certificate of leases/title over the suit property, same [petitioners] have accrued legitimate rights to the suit property. In this regard, the Petitioners have contended that same [petitioners] therefore have property rights to the suit property and which rights are duly protected by the provisions of Article 40 of *the Constitution* 2010.
18. To this end, the Petitioners have thus contended that the tender invitation by the 2nd Respondent for the construction of the social housing units is intended to breach, violate and or infringe upon their [Petitioners] property rights as entrenched in Article 40 of *the Constitution*, 2010.
19. Finally, the Petitioners have contended that the Respondents herein have colluded and conspired to divest the Petitioners of the suit property, wherein same [Petitioners] have been residents for more than 50 years. In particular, the petitioners have contended that the decision of the 2nd Respondent to advertise the tender for the construction of social housing units on the suit property without notice to and/or involvement of the petitioners contravenes the provisions of Article 10 of *the Constitution*, 2010.
20. Furthermore, the petitioners have also contended that the actions by and on behalf of the 2nd Respondent concerning the tender invitation for the construction of social housing units is bound to culminate into the eviction of the petitioners and the rest of the residents of the suit property. In this regard, the Petitioners have contended that same [Petitioners], and the rest of the residents on the suit property shall therefore be exposed to violation of their rights to property, human dignity and privacy.
21. Arising from the foregoing, the petitioners have therefore implored the court to find and hold that the petition beforehand is meritorious and thus the court should proceed to grant the reliefs sought thereunder.

b. 2nd, 3rd, 4th and 5th Respondents' submissions

22. The 2nd, 3rd, 4th and 5th Respondents [hereinafter referred to as the Respondents] filed written submissions dated the 23rd may 2024 and wherein same [Respondents] have reiterated the contents of the grounds of opposition. Furthermore, the named Respondents have thereafter proceeded to and highlighted two pertinent issues for consideration by the court.
23. First and foremost, the named Respondents have submitted that the petition beforehand is premature and misconceive. In this regard, it has been contended that the tender advertisement which is complained of has neither breached, violated and or infringed upon the rights of the Petitioners or at all. In any event, it has been contended that the petitioners have neither disclosed nor demonstrated the manner in which the tender invitation complained of has affected their rights or interests, if at all.
24. Secondly, the named Respondents have submitted that the Petition beforehand is also deficient insofar as same is lacking in material particulars. In addition, it has been pointed out that the petitioners have



not particularized the manner in which their rights and fundamental freedoms have been violated or otherwise threatened with violation.

25. Based on the foregoing, the named Respondents have implored the court to find and hold that the Petition beforehand is not only premature and misconceived but same is intended to defeat the mandate of the government of actualizing the right to housing in terms of the provisions of Article 43[1] [b] of *the Constitution* 2010.
26. In short, the named Respondents have contended that the Petition beforehand does not meet the requisite threshold in the manner stipulated in the case of Annarita Karimi Njeru v Republic [1979]eKLR.
27. Consequently and in this regard, the named Respondents have therefore invited the court to find and hold that the Petition is devoid of merits and thus same [Petition] courts dismissal.

c. Interested Party's Submissions:

28. The interested party herein filed written submissions dated the 22nd July 2024 and wherein same [interested party] has reiterated the contents of the grounds of opposition of even date. Furthermore, the interested party has thereafter highlighted two issues for consideration by the court.
29. Firstly, the interested party herein has submitted that the acts complained of, namely, the tender advertisement has not been undertaken by same [interested party] and hence the interested party has not violated and/or infringed upon the rights of the Petitioners.
30. Secondly, the interested party has submitted that the Petitioners herein have no lawful or legitimate rights to the suit property. In this regard, it has been contended that the Petitioners cannot therefore posit that their properties rights in terms of Article 40 of *the constitution* 2010 have been breached, violated and/or otherwise infringed upon.

Issues for Determination:

31. Having reviewed the Petition and the responses thereto and upon consideration of the written submissions filed by and on behalf of the parties, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the Petition by the Petitioners herein has impleaded the violations of the Petitioners rights and fundamental freedoms with the requisite particularity and specificity or otherwise.
 - ii. Whether the Petitioners herein have accrued any property rights over and in respect of the suit property or otherwise.
 - iii. Whether the tender advertisement by the 2nd Respondent has breached and/or violated the Petitioners' rights in terms of Article 10, 40 and 47 of *the Constitution* 2010 or otherwise.
 - iv. Whether the Petitioners are entitled to the reliefs sought or otherwise.



Analysis and Determination:

Issue Number 1

Whether the Petition by the Petitioners herein has impleaded the violations of the Petitioners rights and fundamental freedoms with the requisite particularity and specificity or otherwise.

32. The Petitioners have approached the court on the basis of the provisions of Articles 22 and 258 of *the Constitution* 2010 and wherein same [Petitioners] are contending that their rights and fundamental freedoms have been breached, violated or infringed upon by the Respondents herein.
33. In particular, the Petitioners herein are aggrieved by the tender advertisement which was undertaken by the 2nd Respondent vide tender Number MLPWHUD/SDHUD/SUD/261/2023-2024.
34. The Petitioners contend that the tender advertisement by and on behalf of the 2nd Respondent is intended to facilitate the construction of social housing units on the suit property wherein the Petitioners have been residing for more than 50 years. In this regard, the petitioners contend that the impugned tender advertisement was carried out and/or undertaken without notice to and/or involvement of the Petitioners.
35. On the other hand, the Petitioners have also contended that the tender advertisement for the construction of social housing units by the 2nd Respondent is likely to culminate into the Petitioners being evicted from the suit property. In this regard, the Petitioners have averred that the likely eviction shall affect and/or violate their [petitioners] rights and fundamental freedoms inter-alia the right to fair administrative action and rights to property.
36. Owing to the fact that the Petitioners have contended that their rights and fundamental freedoms under *the Constitution* are likely to be violated, infringed upon and/or breached, it was incumbent upon the Petitioners to not only implead the provisions of *the Constitution* underpinning the petition, but same [Petitioners] were also obligated to supply the details as to how their [Petitioners' rights] are being violated, breached and/or infringed upon.
37. Furthermore, it was also incumbent upon the Petitioners to venture forward and implead with specificity, the person or persons, if any, that is guilty of breach/violation complained of. For good measure, it was not open to the Petitioners to make omnibus or blanket allegation and thereafter throw such allegations on the face of the court, under the imagination that the court will thereafter plough through the Petition and discern for itself [court] who amongst the Respondents has breached the Petitioners rights.
38. Despite the necessity to implead the manner in which the rights and fundamental freedoms have been violated and by whom, it is worthy to point out that the Petitioners before the court have neither particularized how the various provisions of *the Constitution* enumerated in the body of the Petition have been violated. In addition, the Petitioners have also not stated who amongst the Respondents is culpable.
39. To start with, the Petitioners have impleaded the National Land Commission as the 1st Respondent. However, it has not been stated why the commission has been impleaded. In any event, it has also not been stated whether the commission, which is established by dint of Article 67 of *the Constitution*, 2010, has any role in the construction of social housing units, whose threatened construction founds the basis of the Petition beforehand.



40. On the other hand, it is also worthy to point out that the Petitioners have also not articulated whether the 1st Respondent played any role in the issuance of the impugned advertisement for the construction of social housing units. Nevertheless, it is not lost on this court that the person charged with the realization of the right to housing is the state by dint of Article 21 of *the Constitution*, 2010 and not National Land Commission.
41. Arising from the foregoing, it is difficult to discern the basis and/or foundation upon which the 1st Respondent has been impleaded. Worse still, it is imperative to underscore that the Petitioners herein have neither particularized nor specified what Article of Constitution has been violated by the 1st Respondent to warrant her inclusion in the suit.
42. Other than the foregoing, the Petitioners have also impleaded the Chief Land Registrar, the Inspector General and the Hon Attorney General. Nevertheless, despite their inclusion, there is no complaint that has been mounted or highlighted as against the said Respondents.
43. Suffice it to point out that the Chief Land Registrar is charged with the mandate of inter-alia accepting and registering legal instruments pertaining to land. However, the Petitioners herein have not posited that same [Petitioners] have since presented to the Chief Land Registrar any registrable instrument for purposes of registration or at all.
- [See the provisions of Section 12 of the *Land Registration Act*, 2012, which underpins the role/responsibility of the Chief Land Registrar]
44. As concerns the Inspector General of Police [4th Respondent], it has not been shown and/or demonstrated how the office of the Inspector General played a role in the issuance of the tender advertisement. For good measure, it is not lost on the court that the only complaint which has precipitated the filing of the petition is the issuance/publication of the tender invitation for the construction of social housing units.
45. In respect of the Hon Attorney General [5th Respondent] it has not been posited how the said 5th Respondent has violated the rights and fundamental freedoms of the Petitioners. At any rate, it is worthy to underscore that the Hon. Attorney General by virtue of being the principal advisor of the government is called upon to issue legal advisories to the government and other state organs. [See the provisions of Article 156 of *the Constitution*, 2010]
46. Be that as it may, it has not been pointed out that the office of the honourable attorney general either failed to issue appropriate legal advisory to the 2nd Respondent or proceeded to and issued a legal advisory, which was inappropriate, as pertains to the tender advertisement.
47. Yet again, the Petitioners herein have not particularized the breach and/or violations that have been undertaken/occasioned by the honourable attorney general. Suffice it to point out that, no omnibus allegations would sustain a Constitutional Petition. [See the Supreme Court decision in *Dr. Samson Gwer and 5 Others versus Kenya Medical Research Institute* [2020] eKLR at paragraphs 49,50 and 51 thereof.]
48. Back to the 2nd Respondent. It is the 2nd Respondent who is said to have generated and published the tender advertisement for the construction of social housing on the suit property. At any rate, it is the said tender advertisement which has aggrieved the Petitioners.
49. Arising from the foregoing, it was therefore the obligation of the Petitioners to plead with specificity how the tender advertisement, which is a formal and preliminary process, has violated or threatened to violate their rights. For good measure, there is no gainsaying that the tender advertisement is ordinarily undertaken in accordance with the provisions of Public Procurement & Assets Disposal Act, 2015.



50. To my mind, there is no where, where the Petitioners have contended that the tender advertisement by the 2nd Respondent did not accord with the provisions of the law, or better still, violated any provisions of the relevant law. Furthermore, the Petitioners have also not alluded to any law, which stipulates that same [Petitioners] ought to be consulted before the tender advertisement is made.
51. Be that as it may, the Petitioners herein are obsessed and consumed with the contention that the tender advertisement is likely to culminate into their eviction from the suit property. However, there is no evidence that has been tendered and placed before the court how a tender advertisement can precipitate eviction.
52. On the other hand, it is also not lost on this court that the suit property which is the subject of the petition is public land. In this regard, the administration and management of the said property is placed under the mandate of the National Land Commission.
53. Additionally, it is also worth pointing out that insofar as the suit property is public land same [suit property], can be subjected to public development in the manner determined by the National Land Commission and the various state organs. Nevertheless, prior to and before any such developments are undertaken National Land Commission shall be obliged to issue and serve the requisite eviction notices in accordance with the provisions of Section 152 [A], [B] and [C] of the Land Act, 2012.
54. Arising from the foregoing, I beg to point out and underscore that the Petition beforehand is lacking in material particulars and specificity. At any rate, the Petitioners have merely highlighted various provisions of the Constitution and thereafter proceeded to make omnibus/blanket allegations. However, the Petitioners have failed the test of particularity and specificity which are critical in determining the competence of a Constitutional Petition.
55. To this end, it suffices to cite and reference the decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & Others* [2013]eKLR, where the Court of Appeal stated and held thus;
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
- (42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). 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. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

- (43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.
56. The observations by the court in the decision [supra], reflects the position obtaining in respect of the current Petition. Simply put, the current Petition is loud in allegations and blanket accusations, but offers little or nothing on particularity.
57. In a nutshell, my answer to issue number one [1] is to the effect that the petition beforehand is fatally deficient and defective. Same is lacking in material particularity and specificity. At any rate, such particulars are material and critical. The absence of such particulars is not a procedural deficiency but same impact on the substance of the Petition and by extension the jurisdiction of the court.

Issue Number 2

Whether the Petitioners herein have accrued any property rights over and in respect of the suit property or otherwise.

58. The Petitioners beforehand have contended that same entered upon the suit property on or about the year 1959. Furthermore, it has also been posited that some of the Petitioners comprised of the third generation living on the suit property. On the other hand, the Petitioners have also averred that overtime various governments including the government of his Excellency Daniel Toroitich Arap Moi [deceased] ordered the Petitioners be issued with formal documentation to underpin their [Petitioners] occupation on the suit property.
59. In addition, the petitioners have ventured forward and averred that same [Petitioners] were thereafter issued with formal documentation as well as beacon certificates by the interested party. Besides, the Petitioners have also averred that same have also been issued with letters of allotments.
60. Nevertheless, the Petitioners have contended that despite being issued with the formal documentation as well as letters of allotments same [Petitioners] have been engaging with National Land Commission with a view to being issued with the requisite leases/certificates of titles. However, it has been confirmed by the petitioners that to date same have neither accrued nor obtained any certificates of leases/titles to the suit property.



61. On the other hand, it is also evident and apparent from the body of the petition as well as the affidavit in support thereof, that the suit property wherein the petitioners are in occupation thereof is indeed public land. In this regard, there is no gainsaying that the Petitioners herein have neither accrued nor obtained any legitimate title to and in respect of the suit property. [See the decision of the Court of Appeal in the case of Dr. Joseph N.K Arap Ngok versus Moiyo Ole Keiwa [1997]eklr]
62. Whereas the petitioners may very well have the right to housing on the basis of their occupation of the suit property, however, the Petitioners' right to housing does not supersede the fact that the suit property is public land. At any rate, the Petitioners' rights to housing, does not mean that the state cannot reclaim the suit property and subject same [suit property] to public use, including construction of social housing for the benefit of the public.
63. To my mind, the Petitioners' right to housing must be protected but same must be juxtaposed against the obligations of the state [government] to facilitate the realization of the right to housing in accordance with Article 21 as read together with Article 43 [1] [b] of *the Constitution* 2010.
64. Nevertheless, I wish to point out that insofar as the Petitioners have not accrued and/or obtained title to the suit property, the petitioners herein cannot be heard to underpin the subject petition on the basis of Article 40 of *the Constitution*. For good measure, Article 40 of *the Constitution* protects and vindicate property rights which have crystalized and accrued and not otherwise.
65. Put differently, the Petitioners herein who have not acquired and obtained legal title to the suit property cannot be heard to say that their property rights in terms of Article 40 of *the constitution* are being breached and/or violated. For good measure, property rights accrue in various manners/forms, but suffice it to underscore that one must be seized of the ownership rights before same can be heard to lay a claim founded on breach of such rights.
66. In this regard, it suffices to cite and reference the holding of the Court of Appeal in Nelson Kazungu Chai and Others versus Pwani University [2017] eKLR where the Court stated and held thus:

A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of *the Constitution*. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding.
67. Surely, in the absence of legal title, the Petitioners herein have no proprietary or tangible rights to the suit property to warrant the invocation and application of Article 40 of *the Constitution*, 2010.
68. The significance of title and/or acquisition of proprietary rights to property before invocation of the provisions of Article 40 of *the Constitution* was also highlighted and underscored by the Court of Appeal in the case of Kenya Forest Service V. Rutongo't Farm Limited [2015] eKLR.



69. For coherence, the court stated and held as hereunder:

It is evident that following the registration of the suit land in the appellant's name, bar any allegations that it was acquired by illegal means which is not evident from the petition, this Court is enjoined to recognize the appellant's proprietary interest in the suit land as provided by section 75 of the retired constitution.

We take the view that, from the documents that were placed before the court below, this was a case of willing buyer/willing seller. Since Olsen opted to dispose of the suit land to the appellant, the question of deprivation of the suit land from the respondent cannot be said to arise. The respondent did not acquire any proprietary interest in the suit land which the Government either compulsorily acquired or confiscated or expropriated. As such, the application of Article 40 of *the Constitution* or even section 75 of the retired Constitution was inapplicable to the circumstances of this case.

70. Flowing from the foregoing decision and coupled with the fact that the said Petitioners herein do not have any certificates of leases/titles, I find and hold that there are no proprietary rights which have been breached, violated and/or infringed upon to warrant the intervention of the court.

Issue Number 3

Whether the tender advertisement by the 2nd Respondent has breached and/or violated the Petitioners' rights in terms of Article 10, 40 and 47 of *the Constitution* 2010 or otherwise.

71. There is no gainsaying that the Petition beforehand has been precipitated by the tender advertisement which was undertaken by the 2nd Respondent. It is the said tender advertisement which the Petitioners contend is likely to precipitate their eviction from the suit property.
72. Nevertheless, whilst dealing with issue one herein before, the court has addressed the question of whether or not a tender advertisement is synonymous with an eviction notice. Suffice it to point out that the two are separate and distinct.
73. Be that as it may, it is the tender advertisement that the petitioners herein have sought to challenge for allegedly breaching and/or violating their [Petitioners] rights and fundamental freedoms under Article 10, 40 and 47 of *the Constitution* 2010.
74. To start with, there is no gainsaying that the tender advertisement for the construction of social housing was undertaken by and on behalf of the 2nd Respondent. Furthermore, it is also not lost on the court that the procedure underpinning the undertaking of such tender advertisement is well provided for under the Public Procurement & Assets Disposal Act, 2015.
75. Additionally, it is important to point out that tender advertisement is a formal/preliminary process which may attract bids and therefore be responsive or otherwise. Besides, it is apparent that upon the tender advertisement, the 2nd Respondent would be obligated to subject the bids if any, to inter-alia public participation.
76. To my mind, the complaints if any including public participation and consultation are steps/stages which can only be gone into during the tender process and not at the preliminary stages of tender advertisement. For coherence, any precipitate decision can only be made during the tender and not otherwise.
77. Be that as it may, I beg to highlight that I have not seen any scintilla of allegations/averments that the 2nd Respondent was duty bound to consult the Petitioners before undertaking the tender invitation.



- At any rate, it cannot be gainsaid that the tender advertisement does not fall within the scope of the administrative decision provided for under the Article 47 of *the Constitution* 2010.
78. Other than the foregoing, the Petitioners have also adverted to breach and violation of the provisions of Article 10 of *the Constitution*, 2010. Even though the Petitioners have not come out with clarity about which aspect of Article 10 of *the constitution* has been breached, what is discernible is that the Petitioners are complaining about lack of participation in the decision to undertake the tender advertisement.
79. In my humble view, the Petitioners herein are putting the wagon before the horse. Quite clearly, the complaints by the Petitioners are premature and moot. In any event, the fears/apprehension that underpin the complaints pertaining to breach or threatened breach of Article 10 of *the Constitution*, 2010 are remote and superficial.
80. In my humble view, the Petitioners herein were called upon to tender and place before the court plausible, cogent and credible evidence to vindicate the complaints before the court. However, the Petitioners herein have steered the Petition on the basis of superficial allegations and averments devoid of any substance. In any event, the Petitioners herein also do not appear to understand the dichotomy between a tender advertisement and an eviction notice.
81. Suffice it to underscore, that it was the duty of the Petitioners to prove the allegations at the foot of the Petition. For good measure, proof of the allegations at the foot of the Petition could only be undertaken by availing credible evidence. Unfortunately, the Petitioners have failed to discharge the burden of proof.
82. Before departing from the issue herein, I beg to adopt and reiterate the holding of the supreme court in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR, where the court stated and held thus;
- (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.
83. Sadly, the Petitioners herein have neither met nor satisfied the requisite threshold. For good measure, a Petitioner does not just succeed for merely invoking and alleging breach of human rights and fundamental freedoms. Same are obligated to do more.



Issue Number 4

Whether the Petitioners are entitled to the reliefs sought or otherwise.

84. The Petitioners herein have sought for a plethora of reliefs. Suffice it to point out that the reliefs sought at the foot of the Petition were highlighted and reproduced at the onset of this judgment.
85. To start with, the Petitioners herein sought for various declaratory orders but which were intended to avert any forcible, violent and brutal eviction through demolition of their [Petitioners' homes] situate on the suit property. However, this court has since found and held that the issuance of the tender advertisement, which is complained of is separate and distinct from an eviction notice.
86. At any rate, the Petitioners herein did not tender and/or produce any eviction notice to warrant the contention that the Petitioners are exposed to any forcible or violent eviction whatsoever.
87. Other than the declaration to avert forcible and violent eviction, the Petitioners have also sought for orders of permanent injunction to restrain the Respondents from undertaking and/or constructing structures [social housing] on the suit property.
88. To my mind, the suit property is public land. In this regard, the suit property is available to the state for purposes of undertaking public developments, including construction of social housing, provided that the state issues and complies with the requisite provisions of the law. In this regard, there is no gainsaying that the state is pretty aware of the provisions of Section 152 [A], [B] and [C] of the Land Act, 2012 [2016].
89. Furthermore, it is also not lost on the court that the state is also aware of her obligations pursuant to Article 11 of International Covenant on Economic Social & Cultural Rights [ICESCR], which obliges the state to engage her citizens in public participation/consultation before undertaking any development that is likely to culminate into displacement of her inhabitants.
90. Notwithstanding the foregoing, the suit property remains public land. In this respect, same [suit property] is under the administration and management of the 1st Respondent [National Land Commission] by dint of Article 67[2] of the Constitution 2010.
91. To the extent that the suit property is public land, it is common ground that no order of permanent injunction can issue to restrain inter-alia the 1st Respondent from undertaking her constitutional obligations. Surely, any such order would not only be unconstitutional but would be antithetical to the rule of law.
92. At any rate, it is not legally tenable to grant and/or issue an order of permanent injunction as against the registered or legitimate proprietor of the designated property. Such an order, would in-effect divest the designated owner of his/her lawful entitlement to the property.
93. To this end, I beg to cite and reference, the holding in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, where the court held as hereunder;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

94. Arising from the foregoing, I beg to underscore that the Petitioners herein have neither laid a basis nor met the threshold to warrant the grant of the reliefs/remedies adverted to at the foot of the Petition. For good measure, the burden of proof laid on the shoulders of the Petitioners by dint of sections 107,108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya.



Final Disposition:

95. Flowing from the discussion, [details in the body of the judgment], it is crystal clear that the Petition before the court is not only premature and misconceived, but same is also legally untenable.
96. In the premises, the final orders of the court are as hereunder;
 - i. The Petition herein be and is hereby dismissed.
 - ii. Each party should bear own costs of the proceedings.
97. For the avoidance of doubt, the orders of status quo which were previously issued be and are hereby vacated and discharged.
98. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Murunga for the Petitioners.

Ms. Wanini for the 1st Respondent.

Mr. Motari [Principal Litigation Counsel] for the 2nd, 3rd, 4th & 5th Respondents.

Mr. Jackson Awele for the Interested Party.

