



Teya & 2 others v County Government of Nyamira & 2 others (Environment & Land Petition E001 of 2023) [2024] KEELC 6859 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6859 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND PETITION E001 OF 2023

JM KAMAU, J

OCTOBER 15, 2024

IN THE MATTER OF: INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

**IN THE MATTER OF: THE CONTRAVENTION OF SECTIONS
107, 108, 111, 112, 113, 114, 115 OF THE LAND ACT NO. 6 OF 2012**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES
40, 46, 47, 48, 64 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 2(1) (2), 3(1), 10(1) C), 10(2) (B) AND (C), 12(10 A),
20(1), (2), 22(1), (2), 23, 27(1), 40, 46, 47, 48, 238, OF THE CONSTITUTION OF KENYA 2010,**

BETWEEN

JAMES OBINO TEYA 1ST PETITIONER

FRANCIS ONWONGÁ SITIMA 2ND PETITIONER

JOHN OMANGA MARANGA 3RD PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

DIRECTOR, PHYSICAL AND LAND USE PLANNING NYAMIRA

COUNTY 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT



JUDGMENT

1. In the Petition dated 17/8/2023 the Petitioners seek for orders of;
 1. Declaration that:
 - a. The proprietary interest in Plot no.3 Keroka market, situated in Nyamira County vests in the Estates of the deceased Barnabas Teya Ruoth, Andrew Maranga Ondieki and Sitima Teya Nyamaiko and their respective beneficiaries.
 - b. That the actions of the Respondents' of seizure of the deceaseds' estates herein comprised in L.R Parcel Plot No. 3 Keroka Market, situated in Nyamira county in any way including but not limited to compulsory acquisition, without proper consent or compensation is unconstitutional and breached the petitioner's rights and fundamental freedoms under the provisions of articles 35(1)(a) and 35(3) 40(1), 40(2), 47(1) and 47(2) of *the Constitution* of Kenya, hence void for all intents and purposes.
 2. A permanent injunction restraining the Respondents and any other person acting on their instructions from destroying and or interfering with the rights of the Petitioners and their siblings as regarding the ownership and possession over all that parcel of land known as Plot No.3 Keroka Market, situated in Nyamira County.
 3. Order for mesne profits accruing from the Respondents' illegal encroachment, demolition, acquiring and or trespass/possession and or wrongful enjoyment and benefit from the allocated portion hosting the petitioners' property referred to as parcel known as Plot No. 3 Keroka Market, situated in Nyamira county be fully compensated.
 4. Costs of the suit.
 5. General damages for trespass and demolition of property.
2. The 3 Petitioners claim that they are the beneficiaries of the parcel of land known as L.R. Plot No.3, Keroka Market situate in Nyamira County. Their deceased fathers who were brothers developed the suit property by constructing permanent commercial units from which they collected rent until 20/3/2020 when the Respondents erected a road thereon and while doing so, demolished their aforesaid permanent structures.
3. This Constitutional Petition cites contraventions of several Constitutional Rights and Freedoms under Articles 2(1) (2) 3(1), 10(10 (c), 10(2) (b) and (c)12(1), 20(1) (2) 22(1) (2) 23, 27(1) 40,46, 47, 48, 64, 238 of *the Constitution* of Kenya, 2010 and violation of Sections 107, 108, 111, 112, 112, 114, 115, of the *Land Act*, No. 6 of 2012.
4. The only Response filed in opposition to this Petition is by the 1st Respondent by way of Notice of Preliminary Objection dated 4/12/2023 and filed in Court the following day stating as follows: -

“Notice of Preliminary Objection Pursuant to Order 51 Rule 14(1), of the Civil Procedure Rules, 2010

Take Notice that the 1st and 2nd Respondents shall, in limine, raise a preliminary objection against the instant application dated 17th August, 2023 on Grounds That: -



The application offends the mandatory provisions of Order 51 Rule 14(1), of the Civil Procedure Rules for reasons that:

1. The issues raised are res judicata having been a subject in the Environment and Land Court at Nyamira ELC Petition No.E008 of 2022, James Obino Teya -vs- The County Government of Nyamira, Director, Physical and Land Use Planning Nyamira County and the National Land Commission.
2. The 1st and 3rd Petitioners lack locus standi to bring the suit.

Reasons wherefore it shall be submitted that the instant application is defective ab initio in law and principle and tantamount to abuse of judicial function the 1st and 2nd Respondents on the foregoing grounds apply that this suit be struck out with costs.”

5. In the Affidavit responding to the Petition, sworn on 4/12/2023 and filed simultaneously with the Preliminary Objection, the 1st Respondent through, her Chief Officer Lands, Housing, Physical Planning and Urban Development, Mr. Josphat Motanya Gori, depones, in the selected substantive paragraphs below, that:

3. That this Petition is misconceived, incompetent in law and devoid of any valid cause of action as against the Respondents as :

- 3.1 It is trite law under section 16 of the Government Proceedings Act (Cap 40-Laws of Kenya) read together with Order 29(2)(d) of the Civil Procedure Rules, 2010 that no orders of injunction can be issued against Government.

- 3.2. The instant Petition is repugnant to the provisions of section 25 of the Land Registration Act, 2012 read together with the provisions of Article 40 of the Constitution of Kenya, 2010 in as far as the 1st Respondent’s proprietary rights to the suit land are concerned;

4. That, the records held in the Lands Registry, Nyamira County, show the Plot No. 3 Keroka Market is located on L.R. No. East Kitutu Mwamangera/1128, found in Sheet No. 31 Mwamangera registration Section (Herewith annexed and attached and marked “JGI” is the copy of the official search and a copy of the Sheet Map).
5. That, from the said documents it is apparent that Nyamira County Government is the owner of the said Parcel. Further, it is discernible that one Sitima Teya (Borosoko Co. is the allottee of the suit property i.e. Plot No. 3 Keroka Market, within L.R. No. East Kitutu Mwamangera/ 1128.
6. That upon perusal of documents filed by the Petitioners in court and in admission through their pleadings, it is conclusive that the 1st and 3rd Petitioners herein filed the instant suit as Administrators in the Estate of Barnabas Teya Ruoti and Andrew Maranga Ondieki who are not allottees of the suit property being Plot No. 3 Keroka Market.
7. That, the upshot of the foregoing analysis and or averments is the 1st and 3rd Petitioners are strangers to any proceedings pertaining the Suit Property and derive no colour of right to bring forth the Instant Petition.



8. That, I am advised by the Office of the County Attorney that the 1st and 3rd Petitioners herein lack the requisite locus standi and cannot therefore sustain a reasonable cause of action against the Respondents.
 9. That, indeed the Petition is ill informed, bad in law and an abuse of the court process as it offends the very basic tenets of filing a suit before this Honourable Court.
6. A Preliminary Objection dated 4/12/2023 filed by the 1st Respondent and filed in Court the following day stated as follows: -

“Notice of Preliminary Objection Pursuant to Order 51 Rule 14(1), of the Civil Procedure Rules, 2010

Take Notice that the 1st and 2nd Respondents shall, in limine, raise a preliminary objection against the instant application dated 17th August, 2023 on Grounds That: -

The application offends the mandatory provisions of Order 51 Rule 14(1), of the Civil Procedure Rules for reasons that:

1. The issues raised are res judicata having been a subject in the Environment and Land Court at Nyamira ELC Petition No.E008 of 2022, James Obino Teya -vs- The County Government of Nyamira, Director, Physical and Land Use Planning Nyamira County and the National Land Commission.

2. The 1st and 3rd Petitioners lack locus standi to bring the suit.

Reasons wherefore it shall be submitted that the instant application is defective ab initio in law and principle and tantamount to abuse of judicial function the 1st and 2nd Respondents on the foregoing grounds apply that this suit be struck out with costs.”

7. The same was canvassed and a Ruling delivered on 30/5/2024 dismissing the same with costs.
8. Before proceeding further, I must caution the Petitioners in this case against constitutional avoidance. In Re Application by Bahadur [1986] LRC [Const]. the Court expressed itself as follows:

“The Courts have said time and again that where infringement of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not the constitution. This case highlights the un-wisdom of ignoring that advice

9. In Aliela v Kenton College Trust & another (Employment and Labour Relations Petition E084 of 2022) [2023] KEELRC 226 (KLR) (26 January 2023) (Judgment) Justice Ocharo Kebira held as follows:

“.....The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow, only to be travelled in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under the Constitution. Where a dispute can be litigated under common law or statute, the best course is to have it litigated thereunder. It matters not that alternatively it can be litigated under the Constitution.....
.....



Considering the premises hereinabove.....The suit ought to have been pursued in the ordinary manner under statute.....”

10. In Nyamira Constitution ELC Petition No. E001 of 2022 Christopher Ontiri Ogoti =Vrs= The County Government of Nyamira this Court observed that: -

.....I must point out that the shortcut used by the Petitioner herein does not augur well for his case. The case is highly contentious and required adducing of Evidence but not to be heard by way of Affidavit Evidence which makes it difficult to get to the root of the matter

11. Accordingly, due to the well settled doctrines of constitutional avoidance and exhaustion of statutory provided dispute resolution mechanisms must be followed. Fortunately enough, in the current Petition, very weighty instances of breaches of fundamental rights are manifest and there was no other way of making Declarations to that effect. Secondly, the Reliefs sought by the Petitioners were well supported in the Affidavit in support of the Petition. It would therefore not be in the interest of justice to turn away an Applicant who has moved the Court and tendered all the vital evidence albeit by way of a Constitutional Petition.
12. On 30/3/2024 after delivering the aforesaid Ruling, the Court ordered that parties comply with Order 11 of the Civil Procedure Rules by filing witness statements and the documents they wished to rely on. On 17/7/2024 the respective Counsel told the court that they intended to have the matter heard by way of written submissions rather than adducing evidence in Court. In the bundle of documents relied upon by the Petitioners, there is a Certificate of Confirmation of Grant in respect of the Estate of Barnabas Teya Ruoti who died on 29/6/1999 which was confirmed to Pauline Nyanchera Teya and James Obino Teya in Kisii High Court Succession Cause No. 239 of 2010 on 9/3/2025. There are also Letters of Administration Ad Litem issued on 15/8/2023 in the Senior Principal Magistrate’s Court, Keroka in Miscellaneous Succession Cause No. E052 of 2023 in respect of the Estate of Andrew Maranga Ondieki in favour of John Omanga Maranga, another one from the same court in Miscellaneous Succession Cause No. E051 of 2023 for the Estate of Sitima Teya Nyandiko issued to Francis Onwongá on 15/8/2023. The 3 Petitioners herein therefore satisfied the court that they had locus to move the court. They then produced a letter of allotment from the County Council of Gusii signed by me James S.N Ombese and dated 31/5/2010 confirming that Plot No.3, Keroka Market was given to Sitima Teya, Barnabas Teya and Andrew Moranga vide Africa district council Rukxa Minute No. 447 of 23/5/1952. The letter also confirmed that all the rates had been paid to date. The 3 had also registered a Business name, Bosoroko Trading Company in their joint names on 9/11/1962 and the document showing who owns what in Keroka Township Plots shows that as at 29/3/1010, Plot No. 3 belonged to Sama Teya (Bosomoko Co.) and that the same had been developed and rates cleared up to 2018. There is a letter dated 24/1/2018 from the County Government of Nyamira, office of the Town Administrator, Keroka Town dated 24/1/2018 indicating that Plot No. 3 Keroka Township belongs to Sitima Teya (Bosoroko Co.) and clearly stated that the County Government of Nyamira did not object to the allottee being issued with an allotment letter but even more importantly, a lease. The letter also confirmed that the rents and rates have been paid up to 2018. There were also photographs showing the developments thereon. A demand letter dated 26/6/2020 from the Petitioner’s Advocates then followed complaining of demolition of their permanent houses in the pretext of building a road. And finally, there is attached to the Supporting Affidavit in the Petition of James Obino Teya sworn on 17/8/2023 a Valuation Report by Damon Appraisers giving the value of the demolitions and loss at Kshs.6,055,500/=.
13. I gave both Counsel the opportunity to file their written submissions which they did.



14. Although there is evidence by way of a certificate of official search to show that the parcel of land known as East Kitutu/Mwamangera/1128 belonged to Nyamira County Council as at 20/12/2005 having been issued with a Title Deed on 17/7/1970 there was sufficient evidence to show that the property in Question was allocated to the Estates represented by the Petitioners and there is nothing to contradict the Petitioner's evidence of lawful acquisition of the suit property nor the destruction by the 1st Respondents.
15. On Trespass, Section 3 (1) of the *Trespass Act*, Cap 294 provides that:
- Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
16. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership and as E. Obaga J. held in the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014]eKLR :
- "The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).
17. In Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR where the court faced such a similar situation it was held as follows:
- "A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conducted some excavation. For this reason, I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”
18. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000*), the court stated that;
- "There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10 000 000 is a reasonable award for general damages”.
19. I find that there is no reason to deny the Petitioners Prayers Nos.1(a), (b) and 2 in the Petition dated 17/8/2023. I will also award the Petitioner the sum of Kshs. 3,000,000/= General Damages for Trespass against the 1st Respondent.
20. But Prayer No. 3 fails for the same was not specifically pleaded. It is a pity that Special Damages were not pleaded. The law is very clear that Special Damages must not only be specifically pleaded but also proved. A Party cannot just get a Valuation Report with some figures and attach it to the documents in court without having specifically pleaded the same as Special Damages.
21. The Petitioners will equally get the costs of this Petition.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF OCTOBER, 2024.

MUGO KAMAU



JUDGE

In the Presence of: -

Court Assistant: Brenda

Petitioner's Counsel: Ms Mosomi

Respondent's Counsel: Ms. Moeche

