



**Wao & another v Njiru Ageria Development Limited & 2 others;
Group (Interested Party) (Environment & Land Petition E029 of 2021)
[2023] KEELC 606 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E029 OF 2021
EK WABWOTO, J
FEBRUARY 2, 2023**

BETWEEN

HESBON OTIENO WAO 1ST PETITIONER

CHRIS JOB OMONDI OTIENO 2ND PETITIONER

AND

NJIRU AGERIA DEVELOPMENT LIMITED 1ST RESPONDENT

**INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

SAHAKIAN SELF GROUP INTERESTED PARTY

JUDGMENT

1. Hesbon Otieno Wao and Chris Job Omondi Otieno initiated this suit through a petition dated 22/07/2021. Those named as respondents in the petition were: (i) Njiru Ageria Development Limited - 1st Respondent; (ii) Inspector General of the National Police Service- 2nd Respondent; (iii) The Honourable Attorney General – 3rd Respondents.
2. The petitioners sought the following verbatim orders against the named respondents:
 - a) A declaration that, the demolition of the Petitioners houses and their forced evictions from the eight (8) Plots of land parcel L.R No. 13468 located in Quarry-Njiru Nairobi (the suit property) without providing them and their children with the alternative land and/or without giving them a notice or



hearing was a violation of the fundamental right to inherent dignity, security of the person, and accessible and adequate housing, a violation of fundamental rights of children guaranteed under Article 53 of *the Constitution*; and a violation of the rights of the elderly persons guaranteed under Article 57 of *the Constitution*.

- b) A declaration that the demolition of the houses and business structures and forced eviction without service of notice in writing or information regarding the threatened eviction is a violation of the fundamental right to information under Article 35 of *the Constitution*.
- c) A declaration that demolitions of the houses without according the children and the elderly persons alternative shelter is a violation of fundamental rights of children and elderly persons Under Articles 53, 57 and 21 of *the Constitution*.
- d) A mandatory injunction to compel the respondents to furnish the Petitioners with information pertaining to the ownership of the property L.R No. 13468 located in Qaurry -Njiru, Nairobi (the suit property) reasons for the demolitions of the houses and business structures and what the respondents plan to do with the property.
- e) An award of damages in sum of Kenya Shillings 28,500,000/- being compensation for the damages occasioned to the 1st Petitioner as per the last valuation report dated 24th February 2021 issued by the Reliance Valuers Limited.
- f) An award of damages in sum of Kenya Shillings 4,000,000/- being compensation for the damages occasioned to the 2nd Petitioner as per the valuation report dated 24th February 2021, issued by the Reliance Valuers Limited.
- g) General damages and exemplary damages for violation of the Petitioners rights and freedom.
- h) Any other relief and exemplary damages for violation of the Petitioners rights and freedoms.

Petitioners' case

- 3. The petition was resisted by the respondents. The 1st respondent filed a replying affidavit sworn by Francis Mwangi Githua , a Board Chairman of the 1st respondent on 14th January 2022 and the 2nd and 3rd respondents replying affidavit sworn by Samwel Menganyi an Inspector of Kenya Police Service attached at Kayole Police Station on 15th July 2022.
- 4. The petition was supported by two affidavits, the supporting affidavit sworn by the 1st Petitioner on 22nd July 2021 and a further affidavit sworn by the 1st Petitioner on 25th April 2022. The Petitioners' case was canvassed through written submissions dated 29th August 2022 and further submissions dated 11th October 2022 filed by the Petitioners advocates, M/s Kwanga Mboya & Co. Advocates.
- 5. The case of the petitioners was that on diverse dates between 27th March 2021 and 5th April 2021 the respondents and their employees and agents invaded the suit property and demolished all their houses and without any notice whatsoever. It was averred that at the time of the demolition, the Petitioners had



put up commercial and residential houses which were fully occupied by both the elderly and children who were not given notice to vacate or an opportunity to find alternative shelter.

6. It was also the Petitioners case that it took them over 5 years from 2016 – 2021 to develop the suit properties openly and with the knowledge of all the respondents but they neither raised a complaint nor stopped the said developments from being made on the suit land.
7. It was also stated that the Petitioners never contested or connived in any way so as to warrant demolitions of their properties and hence it was mandatory for the Respondents to obtain eviction court order before they could demolish the Petitioners houses and that the Respondents had failed to exercise substantive due process of the law before embarking on the eviction of the Petitioners.
8. The Petitioners contended that as a results of the Respondents illegal evictions, they suffered anxiety, mental anguish and damages.

The 1st Petitioner particularized the following damages;

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Item

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Description of the property

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Amount

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Two commercial properties developed under Plots No. 13468/670 & 671

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2,400,000/-

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One commercial property developed under Plot No. 13468/665 & 666

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3,400,000/-

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Two residential properties developed under Plots No. 13648.699 & 692

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2,300,000/-

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TOTAL

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28,500,000/-

The 2nd Petitioner particularized the following damages;

Item	Description of the property	Amount
One residential property developed under Plot No. 13468/690.	2,400,000/-	

9. Upon eviction, the petitioners contended that they were not granted an opportunity to salvage their property and goods which were on the suit property. Consequently, the petitioners had incurred losses amounting to millions of shillings.
10. It was the petitioners' case that the said eviction and demolition of properties were executed in an inhuman manner and were thus in gross violation of the petitioner's constitutional rights, namely: the right to property under Article 40; the right to accessible and adequate housing and reasonable standards of sanitation under Article 43; the rights of children under Article 53; (iii) the rights of older members of society under Article 57. They urged the court to grant the prayers sought in the petition.
11. In his written submissions, counsel for the petitioners identified the following as the nine issues falling for determination in the petition;
 - i. Whether the Petitioners were parties to ELC Case No. 494 of 2017.
 - ii. Whether the decree arising from ELC No. 494 of 2017 was capable of enforcement against the Petitioners.
 - iii. Whether the Nairobi City County had the jurisdiction to implement the enforcement notice dated 12th January 2018 in view of the provisions of the deed of transfer of function executed between the Nairobi City County Government and National Government.
 - iv. Whether the Petitioners constitutional rights to fair administrative action was violated.
 - v. Whether the Petitioners rights to ownership of private property was violated.
 - vi. Whether the Petitioners right to fair hearing was violated.
 - vii. Whether the Respondents are jointly and severally liable for compensation to the Petitioners for the losses & damages resulting from the demolitions of their houses.
 - viii. Whether the Petitioners are entitled to the relief sought herein.



12. It was argued by counsel for the petitioners that the Petitioners rights were infringed through the manner in which their properties were ransacked and searched at the instance of the respondent whose officers participated in the ransacking and demolitions.
13. Counsel further argued that the fact of occupation of property entitles a person to protection under Article 40 of *the Constitution*. He contended that the respondents had no basis to demolish the petitioners' properties. It was further argued that the respondents did not observe due process when demolishing the petitioner's premises. Counsel argued that the respondents' unlawful actions of abruptly and suddenly evicting the petitioners without notice and neglecting to accord opportunity for the petitioners to salvage their property amounted to a violation of the petitioners' right to property under Article 40 of *the Constitution*.
14. The petitioners' counsel added that to the extent that the evictions and demolitions were executed without any prior notice whatsoever, it was an unfair administrative action. He contended that the petitioners were, in the circumstances, entitled to compensation for breach of their right to due process.
15. It was further submitted that the respondents lacked the authority in law to evict the Petitioners on the premises of a decree arising from ELC No. 494 of 2017 and further that the said decree was issued after the Petitioners had been long evicted from the suit properties in April 2021.
16. Counsel for the petitioners added that at the time of the demolition, the Nairobi City County had their functions transferred to Nairobi Metropolitan Services and hence it lacked the powers to implement the enforcement notice issued on the 12th April 2018 in April 2021 three years after it was allegedly issued rendering the whole eviction unlawful.
17. Counsel urged the court to grant the prayers sought in the petition and reliance was made in the following cases in support; Court of Appeal at Nairobi Civil Appeal No. 363 of 2014 Between Moi Educational Centre Co. Ltd vs William Musembi & 17 Others, Nairobi ELC No. 251 of 2011 George Kamau Wakanene & 3 Others vs City Council of Nairobi, Nairobi ELC No. 193 of 2010 and 1303 of 2014, Court of Appeal at Malindi Civil Appeal No. 78 of 2016 between Nelson Kazungu Chai vs Pwani University and Gusii Mwalimu Investment Co. Ltd & 2 Others vs Mwalimu Hotel Kisii Limited, Civil Appeal No. 160 of 1995.

The case of the 1st Respondent

18. The 1st Respondent opposed the petition through a replying affidavit sworn by Francis Mwangi Githua, its Board Chairman on 14th January 2022. The 1st respondents also filed written submissions dated 15th November 2022 through M/S Mob Owino Advocates.
19. The case of the 1st respondent was that it is the registered owner of all that property known as L.R No. 13468 located in Quarry Njiru area having acquired the same on 30th May 1989 and it is thereof a stranger to the alleged transaction between the Petitioners and the Interested party.
20. It was also the 1st Respondent's case that the Petitioners failed to exercise due diligence when purchasing the property. It was also contended that the 1st Respondent had tried on numerous avenues of evicting the Petitioners until it obtained a decree in respect to Milimani ELC No. 494 of 2017 which was issued on 24th November 2021.
21. It was contended that the Petitioners also failed to honour the enforcement notice issued by the Nairobi County through Nairobi Metropolitan Service.



22. The 1st Respondent reiterated that it was the legitimate owner of the suit property and the court had already pronounced on the same vide ELC No. 494 of 2017.
23. In its written submissions dated 15th November 2022, the 1st respondent itemized the following as the three issues falling for determination in the petition:
 - i. Whether the Petitioners have any rights over the suit property.
 - ii. Whether the 1st Respondent has violated the Petitioners rights as provided under *the Constitution*.
 - iii. Whether the Respondents are jointly and severally liable for compensation, if any to the Petitioners for the losses & damages resulting from the demolition of their houses.
24. It was argued that the Petitioners had no legal interest over the suit property since the 1st Respondent had a title deed over the same which had been produced as annexure “FMG1”. Reliance was made to Section 24 of the *Land Registration Act*, 2012 and the following cases in support; Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another [2017 eKLR and Esther Ndegi Njiru & Another v Leonard Gatei [2014] eKLR.
25. On whether there were any violations, it was argued that the 1st Respondent obtained a decree vide ELC No. 494 of 2021 and that the eviction was also undertaken pursuant to an Enforcement Notice dated 12th January 2018 by the Nairobi City County.
26. It was also argued that no constitutional issues had been raised to warrant the determination of the Petition in the favour of the Petitioners and hence therefore the respondents cannot be liable to compensate the Petitioner for any loss and damage. The case of Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Misc April 1520 of 1999 was cited in support. The court was urged to dismiss the Petition.
27. Case of the 2nd and 3rd Respondent
28. The 2nd respondent filed a replying affidavit sworn by Samwel Menganyi an Inspector of Kenya Police Service working at Kayole Police Station. The affidavit was sworn on 15th July 2022.
29. The case of the 2nd respondent was that the issue of suit property resolved vide ELC Case No. 494 of 2017, the Nairobi City County issued an Enforcement Notice dated 12th January 2018 following illegal developments on the suit property and the County requested the Ministry of Interior to provide police officers and other logistics.
30. The 2nd respondent added that the Petitioners did not do due diligence when purchasing the property and further they cannot exercise any ownership rights of the same.
31. In their submissions dated 26th September 2022, they outlined three issues for determination;
 - i. Whether in carrying out the eviction of the Petitioners from the land, the Respondents violated the Petitioners rights as alleged?
 - ii. Whether the 2nd and 3rd Respondents are liable for the loss incurred to the Petitioners?
 - iii. Whether the relief sought for by the Petitioners can be granted by this Court?



32. It was argued that the Petition before court is not about ownership of the suit property but whether or not the eviction of the Petitioners was illegal on the basis that the 1st Respondent's rights to the suit property had been extinguished by operation of law and the interested party had acquired ownership by way of adverse possession.
33. It was contended that the issue of ownership of the suit property was determined by Justice Eboso in ELC No. 494 of 2017. It was also submitted that in respect to the eviction that occurred, the Petitioners were given ample notice as proved through the copy of the enforcement notice following illegal developments on the land. It was submitted that the enforcement notice was issued on 12th January 2018 while the Petitioners were evicted on 27th March 2021 and 5th April 2021 which was approximately 3 years after the notice. Reference was made to Section 152E of the Land Act and the cases of Mitu – Bell Welfare Society vs Kenya Airports Authority & 2 Others and Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition No.3 of 2018) were cited in support of the 2nd and 3rd Respondents case.
34. On whether the Respondents were liable for any loss, it was argued that pursuant to Article 254 of the Constitution, the Inspector General of Police is mandated to carry out investigations of any offences and further enforce the law and in the instant case, the Respondents had not overstepped their mandate or acted irrationally.
35. Counsel concluded the submissions by equally praying for the dismissal of the Petition.

Analysis & Determination.

36. I have considered the petition together with all the responses to the petition. I have similarly considered the parties' submissions, together with the cited law and authorities. Having considered the parties' pleadings, evidence and submissions, the following are, in the court's view, the four key issues falling for determination in this petition;
 - i. Whether at all material times, the petitioners were the lawful owners and inhabitants of the suit property,
 - ii. Whether the petitioners have established violations of their rights by any of the respondents,
 - iii. Whether the petitioners are entitled to any of the reliefs set out in the petition against any of the respondents.
37. The first issue is whether at all material times the petitioners were the lawful owners and inhabitants of the suit property. The petitioners contended that they were the lawful owners and inhabitants of the suit property having acquired the same from the Interested party. They did not, however, place before court any official search or certified extract of the parcel register to prove ownership and lawful occupation. There is however no conclusive evidence placed before the court to demonstrate that the petitioners were lawful owners and inhabitants of the suit property which is a registered piece of land under the names of the 1st Respondent. Furthermore, the decree issued in ELC No. 494 of 2017 doesn't not in any way support the Petitioners contention. My finding on this issue is that the petitioners were not lawful owners and inhabitants of the suit property, Land Reference Number 13468.
38. The second issue is whether the petitioners have established violations of their rights by any of the respondents. In its interpretation of the above provisions, this court has taken the view that the Bill of Rights applies both vertically as against the state, and horizontally against private persons, and that



in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual. Article 2(1) and 20(1) of *the Constitution* are clear that the Bill of Rights applies and binds all state organs and all persons-see the decision of the court in Abdalla Rhova Hiribae & 3 Others v The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya v Betty Sungura Nyabuto & Another Petition No. 21 of 2010 B.A.O & Another v The Standard Group Limited & 2 Others Petition No. 48 of 2011 and Duncan Muriuki Kaguuru & Another v Baobab Beach Resort & Spa Ltd High Court Petition No. 233 of 2012.

39. The petitioners contended that they were lawful owners and inhabitants of the suit property. They further contended that the respondents illegally evicted them and demolished their properties. A reading of the petition reveals that the petition is founded on the fact of the petitioners' ownership and lawful occupation of the suit property. Regrettably, the petitioners failed to place before court evidential material to demonstrate that they were the lawful owners of the suit property and they were at all material times in lawful occupation of the suit property. They did not place before court any conclusive evidential material to enable the court arrive at a conclusion that they were the owners of the suit property and that their alleged occupation of the suit property was lawful. The court therefore has no basis upon which to make a finding of liability against the Respondents, the Petitioners having failed to prove the fact that they were the lawful owners and occupiers of the suit property, the very foundation of the petition, they cannot be said to have established a basis for a claim of violation of any of their rights as enumerated in the petition. My finding on the second issue therefore is that the Petitioners have not established violation of their rights by any of the respondents.
40. The last issue is whether the petitioners are entitled to any of the relief set out in the petition against any of the respondents. Having found that the petitioners have not proved lawful ownership and occupation of the suit property and have similarly failed to establish violations of their constitutional rights by any of the respondents, it follows that they have failed to prove their petition on a balance of probabilities. The net result is that they are not entitled to any of the reliefs sought in the petition.
41. In light of the above findings, the Petition dated 22nd July 2021 is hereby dismissed with an order that each party shall bear their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY 2022.

E.K. WABWOTO

JUDGE

In the presence of:-

N/A for the Petitioners

N/A for the 1st Respondent

N/A for the 2nd and 3rd Respondent.

Court Assistants; Caroline Nafuna and Philomena Mwangi.

