



REPUBLIC OF KENYA



**Ndung'u & another v The National Land Commission & 4 others (Constitutional
Petition 9 of 2019) [2023] KEELC 16147 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CONSTITUTIONAL PETITION 9 OF 2019
MN GICHERU, J
MARCH 15, 2023**

BETWEEN

VIRGINIA WANJIRU NDUNG'U 1ST PETITIONER

JACINTA WAMBUI NDUNG'U 2ND PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

**THE OFFICER COMMANDING POLICE STATION, NGONG 4TH
RESPONDENT**

**CHINA COMMUNICATIONS CONSTRUCTION LIMITED 5TH
RESPONDENT**

JUDGMENT

1. The Petitioners seek the following reliefs against the Respondents.
 - a. Declarations that they are entitled to rights to housing, fair administrative action, humane treatment, children rights and rights of old members of society to live in dignity as provided for in Articles 29, 43, 47, 53 and 57 of the Constitution of Kenya among other Articles of the same Constitution.
 - b. A declaration that the actions and omissions of the 1st to 5th Respondents violate the fundamental rights and freedoms of the Petitioners herein and their families.
 - c. An order for compensation for breach of fundamental rights and freedoms.



- d. An order for compensation for compulsory acquisition of the suit property by the first Respondent on behalf of the Government.
 - e. An order for compensation for general and exemplary damages and loss of the first and second Petitioners' household goods set out in paragraph 11 of this petition.
 - f. Costs of the petition.
 - g. Any other relief that the court may deem fit.
2. The Petitioner's case is as follows. They are the wife and daughter of Patrick Ndung'u Kiarie who is the registered owner of L.R. Ngong/Ngong/5143. They have developed it by building a family house amongst other developments. The suit land was invaded by the second Respondent who destroyed their home and built a Standard Gauge Railway Station thereon. They were not paid any compensation.
- In addition to the complete destruction of the Petitioners' home and total occupation of their land by the Standard Gauge Railway Station, the Petitioners were generally harassed by police and locked up in custody at Ngong Police Station on several occasions. It is for the above stated reasons that they filed this petition.
3. In support of the petition the Petitioners filed the following evidence.
- i. Two supporting affidavits by the Petitioners.
 - ii. Copy of marriage certificate between the first Petitioner and the registered owner of the suit land dated 20/2/1994.
 - iii. Copy of title deed for L.R. Ngong/Ngong/5143.
 - iv. Copy of letter dated 10/4/2019 protesting against harassment and illegal arrest.
 - v. 7 copies of black and white photographs showing a stone house under demolition.
 - vi. Copy of title deed for L.R. Ngong/Ngong/93532 in the name of Patrick Ndung'u Kiarie.
4. The Petition is opposed by the second Respondent which filed an answer thereto dated 12/7/2019. In the answer, it is stated that due process was followed in compulsorily acquiring the suit land and that payment was partly made to the land owner and what has not been paid is available but it is awaiting the resolution of a dispute as to the ownership of one of the land parcels.
5. In support of the answer to the petition, the second Respondent filed the following evidence.
- i. Witness statements by Edgar Celebwa and Wycliffe Agutu both dated 2/2/2021.
 - ii. Gazette Notice No. 8480 of 21/10/2020 showing the suit land among the Nairobi – Naivasha Standard Gauge Railway Station project phase 2.
 - iii. Gazette Notice dated 22/12/2017.
 - iv. Copies of awards for the suit land dated 5/4/2019.
 - v. Copy of ruling in ELC Case No. 34 of 2019 at Ngong Law Courts between the Petitioner's husband and others and one Leiyan Ole Tumuti.
 - vi. Copies of letters dated 19/5/2020, 8/6/2021 and 15/6/2021 between the first Petitioner's husband's advocate and first Respondent.



6. According to the evidence by the second Respondent's witnesses, the delay in compensating the first Petitioner's husband was occasioned by the suit land being bigger on the ground than it is in the map and land records. The resurvey precipitated a dispute between the registered owner and the previous owner. Arbitration took time hence the delay. As at 21st February 2021, all improvements within the suit land had been compensated and the balance was in the process of payment.

It is also in the answer to the petition that the demolition of the Petitioner's house was done by the Ministry of Interior and not by the second Respondent.

7. The third and fourth Respondents filed three grounds of opposition dated 10th September 2019 in which they raise the following issues with the petition.

- i. Firstly, it does not meet the threshold for grant of the conservatory orders sought.
- ii. Secondly, it is contrary to Article 40(3) (b) of the Constitution of Kenya and
- iii. Thirdly, it is an abuse of the court process and a waste of the court's judicial time. The third and fourth Respondents call for the dismissal of the petition with costs.

8. The fifth Respondent filed grounds of opposition dated 20/3/2020 which can be summarized as follows. Following the compulsory acquisition of the suit land, the Petitioners' legal claim to the said land was converted into a claim for monetary compensation only.

By operation of law, the suit land now vests in the public land domain and not in the petitioners.

9. At the trial on 25/11/2021, the two Petitioners testified by adopting their witness affidavits and documents. They were then cross-examined by the counsel for the second and fifth Respondents. The second and fifth Respondents each called one witness who testified by adopting their filed evidence and they were then cross examined by the Petitioners' counsel.

10. Counsel for second and fifth Respondents filed written submissions on 21/4/2022 and 24/2/2022 respectively. The Petitioners' counsel filed his on 23/6/2022. The issues raised in the submissions are as follows.

- i. Whether the procedure for compulsory acquisition was adhered to?
- ii. Whether the Petitioners were entitled to compensation?
- iii. Whether the second Respondent violated the Petitioners' fundamental rights and freedoms?
- iv. Whether the Petition meets the threshold for grant of conservatory orders?

11. I have carefully considered the petition in its entirety including the grounds, affidavits in support, documents filed by all the parties, witness statements and evidence adduced at the trial and I make the following findings on the four issues raised above.

12. On the first issue, I find that the procedure for compulsory acquisition was adhered to. In their affidavits, documents and testimony in court the Petitioners did not adduce any evidence to prove that there was breach of the procedure set out in Sections 107 to 133E of the Land Act (Act No. 6 of 2012). It was incumbent upon them to prove this aspect of their petition and they failed to do so.

13. On the second issue, I find that the Petitioners are entitled to compensation but not directly but through the registered owner of the land, Patrick Ndung'u Kiarie. Again the Petitioners have not been able to prove that Patrick Ndung'u Kiarie has not been paid. The evidence by Edgar Celebwa



that compensation for development was paid and the one for the land was in process has not been controverted by the Petitioners in any way.

14. On the final issue, I find that the Petition does not meet the threshold for the grant of conservatory orders for two reasons.

Firstly, the entire petition is based on unproven allegations which are not backed by any credible evidence at all. The Petitioners do not seem to understand that both under the Constitution particularly Article 40(3) (b) and Sections 107 to 133 and the *Land Act*, the Government has power to compulsorily acquire land for a public purpose or interest and the best that the owners can get is monetary compensation.

Secondly, I find that the land owner has been duly compensated or is the in the process of being compensated.

For the above stated reasons, I dismiss the petition with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 15TH DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

