



**Kariobangi Sewerage Farmers Self Group v Sanitation & Irrigation & 7 others;
 Legal Advice Centre t/a Kituo Cha Sheria (Interested Party) (Environment &
 Land Petition 11 of 2020) [2023] KEELC 18586 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18586 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
 ENVIRONMENT & LAND PETITION 11 OF 2020**

**AA OMOLLO, J
 JULY 6, 2023**

BETWEEN

KARIOBANGI SEWERAGE FARMERS SELF GROUP PETITIONER

AND

SANITATION & IRRIGATION 1ST RESPONDENT

**PRINCIPAL SECRETARY MINISTRY OF LANDS & PHYSICAL
 PLANNING 2ND RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND NATIONAL
 SECURITY 3RD RESPONDENT**

DEPUTY COMMISSIONER KASARANI SUB COUNTY 4TH RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 5TH RESPONDENT

REGISTRAR OF TITLES 6TH RESPONDENT

CHIEF LAND REGISTRAR 7TH RESPONDENT

ATTORNEY GENERAL 8TH RESPONDENT

AND

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA INTERESTED PARTY

JUDGMENT

1. What is before this court for determination is the Petitioner’s amended Petition dated 15th June 2022 together with an affidavit in support sworn by Isaac Abdi Adan on the same date seeking for the following reliefs;



1. An order of immediate restitution of the Petitioner's members into the parcel of land known as Nairobi/Block/175.
 2. A prohibition order to be issued against the Respondents in future from proceeding to evict the Petitioners from the property known as Nairobi/Block/175.
 3. A declaration that the Respondents' actions are an abuse of power and unconstitutional and against statutory law.
 4. A declaration that the Respondents are in breach of rights enumerated in the petition, the petitioners have suffered damages, pain and suffering.
 5. A declaration that the Petitioner are therefore entitled to special damages, general and exemplary damages against the Respondents herein jointly and/or severally.
 6. A declaration that based on prayer 5, the petitioner members are at liberty to file separate civil claims from the ascertainment of the individual special damages.
 7. Costs
2. The Petitioner stated that they are the legal owners of the property known as Nairobi/Block/175 hereinafter referred to as "the suit property" which they acquired through allocation from the 4th and 7th Respondents by virtue of Section 7 of the *Land Act* and have been in peaceful occupation of the same since 1996.
 3. The Petitioner averred that the 4th Respondent formalized their ownership by issuing them with allotment letters subsequent to which its members obtained individual certificates of lease to the suit plots and that there is unassailable proof through documentary evidence and correspondence that the State and the County Government of Nairobi has acknowledged their ownership as procedural, regular and lawful.
 4. The Petitioner pleaded further that they had legitimate expectation that once the suit property had been allocated to them, they would exclusively occupy it without any interruption from anybody including the government agencies. That around 22nd April 2020, there were rumors that there would be evictions by the Respondents although no eviction notice was served on them.
 5. It is the Petitioner's averment that on 4th May 2020 at around 5am, the Respondents unlawfully and forcefully evicted them despite the court orders stopping their eviction and that the same was done during COVID -19 pandemic and during cold season in the most brutal, inhumane and unproportionate manner being their homes and their livelihoods.
 6. The Petitioner stated that the failure by the Respondents to serve them with a notice violated their right to be heard as they were denied opportunity to make their representations before the Respondents and which acts were in breach of *the Constitution*. They contended that all State organs are bound by law and they have no right to subject any citizen to harassment or derogatory treatment. The petitioned that the Respondents are endangering their lives since they are being rendered homeless during this crucial time the country is faced with a pandemic. That their right to be heard can only be safeguarded if this court upholds the law as the custodian of justice.
 7. The Petitioners proceeded to lay out the legal provisions in support of their petition as provided in *the Constitution* and international law instruments. They stated that the preamble of *the constitution* demands that the Petitioners alongside all the People of Kenya work towards a government and society based on the essential values of human rights equality, freedom, democracy, social justice and the rule



of law. Further, Article 2(1) declare the supremacy of *the constitution* which is binding on all person's including State organs and Article 10 requires all State organs and officers be bound to the national values and principles of governance.

8. The Petitioners contended that under Article 22(1) and 258 they are vested with authority to commence legal proceedings before this Court for enforcement of the Bill of Rights enshrined in *the Constitution* and defend the values and principles of *the Constitution*. They cited Article 40 of *the Constitution* and Article 17 of UDHR which bestows the right to protection of their property. They assert that *the Constitution* guarantees them a right to accessible and adequate housing and to reasonable standards of sanitation; to fair administrative action that is expeditious, efficient, lawful and reasonable and procedurally fair.
9. The Petitioners further stated that Article 6 of the Universal Declaration of Human Rights provides that everyone has a right to recognition everywhere as person before the law while article 7 provides that all are equal before the law and are entitled without discrimination to equal protection of the law. Further, that Article 36 provides them with a right to a fair and public hearing by an independent and impartial tribunal in the determination of is rights and obligations against him.
10. The Petitioners pleaded that Article 22 of the UDHR provides them with the right to social security and is entitled to realization through national effort and international co-operation and in accordance with the organization and resources of each state while under Article 28 they are entitled to social and international order in which their rights can be realized.
11. The Petitioner also cited Article 25 of UDHR which provide for the right to a standard of living adequate for the health and wellbeing of himself and his family including food, clothing, housing and medical care and necessary social services and the right to security in case of unemployment, sickness, disability, widow hood, old age or other livelihood in circumstance beyond his control and also Article 25(2) stating that motherhood and childhood are entitled to special care and assistance and Article 28 providing the petitioners are entitled to social and international order in which their rights can be realized.
12. The Petitioners contended that the Respondents violated their right to be treated in humane treatment by failing to serve them with an eviction notice and treated them in a cruel manner by denying them an opportunity to be heard. They added that the Respondents violated and threatened their right to dignity and them in an inhumane manner by seeking to evict them from their property acquired lawfully and destroying their source of livelihood and evicting them at 5 am during the cold season and during the Covid 19 pandemic.
13. The Petitioners contended that the Respondents violated their right to property in seeking to possess the suit property with intimidating actions which they have no beneficial or proprietary interest in them and their actions of purporting to reclaim their suit property is unlawful and unconstitutional.
14. The Petitioners stated that the Respondent's actions seek to defeat their right to housing which is enshrined in *the Constitution* and that their right to economic development and livelihood shall be defeated since their social lives will be affected when they are homeless. They posit that having occupied the suit property for a long time, their expectation was to use the same without interference from any state agency; that they would be accorded an opportunity to be heard before any adversarial action is taken against them; and that the Respondents would consult them before taking any step in approving the use of the suit property in any way.
15. They added that the Petitioner had legitimate expectation that their members' families would not be subjected to arbitrary threats of eviction by the State after lawfully acquiring the suit property,



and paying for the annual land rates and rent to the 4th Respondent. That the Respondent would respect the rule of law, court orders and treat them with dignity. The Petitioners contended that the Respondents have abused their power by seeking to displace them from the suit property despite court orders being in place.

16. The 8th Respondent filed grounds of opposition dated 20th February 2023 stating that the petition is sub-judice as the parties and the issues in dispute are similar to those in Nairobi ELC PET E023 of 2020 which matter has been heard and is pending Judgement. They further contended that the suit property belongs to the County Government of Nairobi, since the Petitioner has failed to provide any evidence showing any interest by the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th Respondents and the Petition is based on mere allegations.
17. The 8th Respondent stated that there are clear procedures for alienation of public land and that the Petitioner has not adduced any evidence that the said procedures were complied with. That the Petitioner are encroachers on public land and if the alleged evictions were conducted which is denied then the same was done in accordance with the law, hence the Petition is fatally defective and an abuse of the court process.
18. The Petitioners responded to the Grounds of Opposition vide a replying affidavit sworn by Isaak Abdi Adam on 17th March 2023 stating that the matter is not res subjudice. Isaak deposed that the Respondents have not proven that the matter is being considered in another court and PET 023 of 2022 cited was filed after this instant Petition hence the objection should be on the case filed later. He also deposed that the Respondents did not show the clear procedures of alienation of public land that were not followed and in any case they did not seek cancellation of their title.
19. The Petitioners contended that had they been given time to consult and given notice of eviction, they would have tried to salvage their household and personal goods and which then would not have been destroyed. They also put reliance on the affidavit filed by the Interested Party on 16th August 2022 and sworn by Dr Annette Mbogoh, the Executive Director.
20. The Interested party filed a replying affidavit sworn by Dr. Annette Mbogoh on 16th August 2022 stating that the instant petition is a matter that was undertaken at the height of the dusk-to-dawn curfew across the country, and which had 8,000 people illegally evicted from their settlement in Kariobangi by the government. That the eviction resulted in their structures on the suit property being demolished and with the heavy rain pounding Nairobi County, the dwellers of the suit property including the children slept out in the cold. They added that the eviction took place in the most brutal manner noting that among the residents are children, the elderly and pregnant women. Dr Mbogo deposed further that the demolitions sparked outrage and condemnation in both mainstream, social media and international community including by the UN Special Rapporteur on the right to housing due to the immense human suffering that resulted.
21. The Interested party stated that there were verbal orders of eviction issued on 3rd May 2020 which made the Petitioners move the to court to stop the evictions. That the court certified the matter urgent, scheduled for a hearing on the 7th May 2020 and issued an interim order stopping the evictions. Nonetheless the Respondents disregarded the same and proceeded with the evictions. The Interested party contended that the evictions were done on the guise that the government was reclaiming public land. However, the suit property is owned by the Petitioner who has gone a great length to prove that they have legal title to the parcel of land and that even without considering the issue of proprietorship, there was no justifiable reason to evict them in the inhuman way it was undertaken.



22. The Interested party posited that *the Constitution* of Kenya under Article 43(1)(b) entrenches the right to accessible and adequate housing and reasonable standards of sanitation and also, Kenya is obliged under a range of human rights treaties such as International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights to refrain from and prevent forced evictions. They further stated that the Committee on Economic, Social and Cultural Rights has emphasized that evictions may be carried out only as a last resort, once all feasible alternatives have been explored and appropriate procedures and legal safeguards are in place such as consultation with the people affected, adequate and reasonable notice, adequate alternative housing and compensation for all the losses, safeguards on how evictions are carried out and access to legal remedies and procedures.
23. The Interested party contended that the government is required to ensure that no one is rendered homeless or vulnerable to other human rights violations as a consequence of an eviction and looking at the eviction of the Petitioners from the suit property, the constitutional, statutory and international standards were not met and implored the court to grant the petitioners the prayers sought in the petition and intervene to protect their rights.

Submissions

24. The Petitioner filed undated submissions which addressed three issues namely;
 - i. whether the petitioners' members are the legal proprietors of the suit property,
 - ii. whether the Respondents followed the law in carrying out the evictions
 - iii. whether the unlawful evictions violated the Petitioners' rights.
25. The Petitioners submitted that they are the registered proprietors of the suit property as they hold the certificate of lease under the *Land Registration Act* 2012 which is a conclusive proof of absolute ownership as was stated in the case of *Pungu Oceanic & Construction Ltd v Juma Tsala & 13 others* [2021] Eklr which held

“Nothing has been presented by the defendant to prove that the plaintiff's title is unlawful or that it was fraudulently acquired, and following Section 24 above, it is the plaintiff who is entitled to enjoy all proprietary rights including the right of possession, ingress and egress. The defendants have not come to court to demonstrate that they have any recognizable interest over the suit land. The defendants have therefore no right to be in possession and occupation of the suit property. Their continued occupation of the suit land is a violation of the plaintiff's right to property.”
26. The Petitioners submitted that the procedures of evictions as set out in the *Land Act* 2012, contending that Section 153B provides that evictions are to be carried out in accordance with the Act and Section 153C provides that eviction notice to occupiers of public land in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement in a local language where appropriate at least three months before the eviction and other mandatory procedures of evictions which were not followed.
27. The Petitioners submitted that additionally, Section 155 of the *Land Act* 2012 provides specific guidelines regarding evictions from land unlawfully occupied, including public land and it entails the service of a first notice by the National Land Commission on that person to show cause as to why he should not be ordered to vacate the land and the notice to show cause must inform the person of his right to be heard. Secondly, it is only after the person has had the opportunity to show cause that the



- National Land Commission can issue a second notice to the person, and this second notice is the one to vacate.
28. The Petitioners submitted that the importance of issuing notices as per the *Land Act* 2012 was enunciated by the Court of Appeal in *Benson Wekesa Milimo v National Land Commission & 2 others* (2021) eKLR where the court held that the notice served on Benson was clear that he was being evicted from unlawful occupation of a public land. Even assuming for the sake of argument that Benson was in unlawful occupation of public land, it was mandatory for the Commission to comply with section 155 of the *Land Act*, by first serving Benson with a notice to show cause as to why he should not be required to vacate that land, and secondly, informing Benson in that notice, of his right to be heard. It is only after failing to show cause as to why the land should not be vacated, that an eviction notice could issue. The Commission failed to demonstrate that it complied with these statutory provisions, and therefore, due process was not followed in issuing the impugned notice.
 29. Further, the Petitioners cited the case of *William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others* [2021] eKLR which reiterated the importance of following the laid down procedures in evictions stating that the Court in laying out principles that an evicting party must comply with which include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property, it applied international principles of law later clarified by this Court in *Mitubell* and which were crystallized as law in Section 152(A) – (H) of the *Land Act*. The Petitioners submitted that these principles flow from UN Guidelines on Evictions: General Comment No.7 which in *Mitubell* was stated are intended to breathe life into the Right to Dignity and Right to Housing under the ICCPR and ICESCR respectively hence these principles were applicable to the eviction of the Petitioners as a matter of obligation by the State under international law as provided for in Articles 2(5) and 2(6) of *the Constitution*.
 30. It is the Petitioners submission that the unlawful evictions violated their rights to property, right to dignity and their socioeconomic rights. They stated that the right to property as provided for under Article 40 of *the Constitution* applies to land that was acquired legally and they acquired the suit property legally. That the State already investigated their documentation and ascertained that there was no evidence of forgery and illegalities hence they cannot be arbitrarily deprived of the suit property or their enjoyment of quiet possession of the same.
 31. They further submitted that even assuming that the suit property was illegally acquired, the same ought to have been subjected to the due process and the Petitioners should not be arbitrarily deprived of the property. They cited the holding in *Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others Nairobi Petition No. 7 of 2012* [2013]eKLR and *Evelyn College of Design Ltd v Director of Children’s Department & another* [2013] eKLR that if the land has been illegally acquired, then the State must use due process to recover it.
 32. The requirement of due process is underpinned by several provisions of *the Constitution*. First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process. Third, Article 47(1) guarantees every person a right to fair administrative action which includes due process.
 33. The Petitioners submitted that the Respondents violated the Petitioner’s right to dignity by evicting them in the most cruel and inhumane manner during a crucial moment when the country was battling



Covid-19 without serving them with any eviction notice and in the process destroying their source of livelihood. Further, the Petitioners submitted that the Respondents violated their right to housing which is enshrined in *the Constitution*, right to economic development and that their livelihood was also defeated since their social lives were affected when they became homeless. In supporting this averment, the Petitioners cited the Supreme Court of Kenya in *William Musembi 13 others v Moi Educational Centre Co. Ltd* (supra) which held that it is an undeniable fact that forced evictions generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under Article 43 of *the Constitution*, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and education. The onus of ensuring that these rights and freedoms are attained and provided for falls squarely under the ambit of the State; and that it is the obligation of the State to ensure that these rights and freedoms are not limited without reasonable justification in an open and democratic society based on human dignity, equality and freedom as provided for under Article 24(1) of *the Constitution*.

34. The Petitioners submitted that the unlawful evictions violated their rights and they are entitled to compensation for Kshs.250,000 per person and there being 369 petitioners the total is Ksh.92,000,000. That they arrived at this amount guided by decision in the *William Musembi 13 others* case (supra) where the court ordered the 1st Respondent to pay a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000) to each of the Petitioners.
35. The Interested party filed submissions dated 18th March 2023 in support of the Petition and laid out the facts of the matter in summary. They framed the issues to be submitted on as follows;
 - i. whether the petition is sub judice in view of Nairobi Elc Pet E023 of 2020,
 - ii. whether the petitioners are the lawful owners of known as Nairobi/Block/175,
 - iii. whether an order for restitution of Petitioners to their parcels of land should be granted,
 - iv. whether the evictions took place, whether the evictions were consistent with the law and international standards and norms and what remedies should be granted.
36. The Interested party submitted that for a party to plead the defence of sub judice, they have to table evidence to prove the said assertion and the court ought to satisfy itself that the ingredients for sub judice as provided in Section 6 of the *Civil Procedure Act* have been met. In support of this argument, they referred the court to the case of *Wensley Barasa v Immaculate Awino Abongo & another* [2020] and *Waste and Environment Management Association of Kenya v County Government of Nairbi & another* (Petition 3 of 2021) [2022]KEELC 3172 (KLR).
37. The Interested party averred that the Petitioner has unassailable evidence that they are the lawful owners of the suit property while the Respondents state that there is no evidence that clear procedures on alienation of public land were followed. They added that the Petitioners have gone to a great length to prove that their title is regular and their documents which were subjected to examination were found to be genuine.
38. The Interested party also submitted that the evictions in subject were a matter of public notoriety, were inconsistent with the law and international standards and norms as pointed out by the media, UN Rapporteur's communication to the President and the ICJ communique. They urged the court to take judicial notice, adding that judicial notice has statutory underpinnings and, in several instances, courts have taken judicial notice of facts to prove certain facts. In support they cited the case of *Ngunjiri Wambugu v Inspector General of Police & 2 others* [2019] where the court took judicial notice of



various media reports, copies of Newspapers, print outs and photographs, the information of which was all in the public domain and widely reported in the local dailies and news on all broadcasters.

39. The Interested party submitted that assuming the suit property was public land, based on the Petitioners' long occupation they acquired a protectable interest in the land. The Interested Party cited the Supreme Court decision in Mitu-Bell case hence as per section 98 of the Land Laws (Amendment) Act, 2016, the Petitioners are entitled to three months' eviction notice notwithstanding that they were occupants of private, public or community land. They further relied on the decision on Mitu-Bell and Fatuma Khamis Bilal & 3505 others v Kenya Railways Corporations & 6 Others [2021] Eklr to submit that even where eviction of people may be necessary, there is need to follow the due process.
40. The Interested party submitted that the Respondents violated the Petitioners' right to housing, right to property and right to dignity they failed to give them an opportunity to salvage their personal and household items. They added that the evictions took place despite there being a valid court order which was issued on 4th May 2020 and flouted the procedures set out in Section 98 of the Land Laws (Amendment) Act.
41. The Interested party assert that the Petitioners should be reinstated back to the suit property as they hold the title and were in occupation for a long time. To support this assertion, they relied on the case of Fatuma Khamis Bila & 3505 others vs Kenya Railways Corporation & 6 others [2021] Eklr where the court held that the Petitioners were entitled to the property and compensation before relocation. They also concluded that it is impossible to ascertain the individual special damages of the occupiers in this Petition and urged the court to take the position taken in Fatuma Khamis Bilal case (supra) where the court allowed the occupiers to file separate claims for assessment and compensation.

Analysis

42. I have read the highly detailed amended Petition, the grounds of opposition by the 8th Respondent, the Petitioners' replying affidavit, the replying affidavit of the Interested party and the documents annexed in support of the Petition. Equally, I have considered the lengthy submissions filed by the Petitioners and the Interested Party. The facts are already summarized herein above and there is no need to repeat.
43. The issues for determination in this Petition are as follows;
 - a. Whether the Petition is subjudice?
 - b. Whether the Petitioner or its membership have any legal right to the suit property?
 - c. Whether the Petitioners were forcefully evicted by the Respondents in breach of their constitutional and statutory duties or obligations?
 - d. Whether the Petitioners' constitutional rights and freedoms were violated by the Respondents?
 - e. What orders or reliefs to issue if any.

a. Whether the Petition is subjudice

44. The Respondents contended that there is another matter ELC Pet E023 OF 2020 filed in court involving the same parties, suit property and raising same issues whose judgment is pending. The Supreme Court in the Advisory Opinion in Kenya National Commission on Human Rights v



Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR at para 67 elaborated the doctrine of subjudice as follows;

‘The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.’

45. The 8th Respondent did not indicate the date of filing of Petition ELC 023 OF 2020 however, I checked at the Court Portal and noted that it is dated 15th October 2020 and filed on 16th October 2020. This Petition was filed in May 2020 before it was later amended which means it was the first one. This comes out even when considering the numbering of cases, the instant petition No.11 of 2020 before ELC Pet E023 OF 2020. It is worthy to note that the Respondent invoked the doctrine of subjudice but failed to produce evidence to this court to establish that the other suit touched over the same subject matter, and was filed by these same parties or their representatives.

b. Whether the Petitioner lacks locus?

46. The Respondents in the Preliminary Objection dated 2nd June, 2020 stated that the Petitioner lacked locus because it was registered in 2018 while the allocation took place on 16th January, 2007. A reading of the certificate of registration produced as annexure 1AA-A gives the date of registration of the Petitioner as 20th July, 1999. The date of 4th March, 2018 is indicated as dated of issue which in my view is date of issue of the certificate. The correspondences exchange between the 5th Respondent and the Petitioner over the period in issue was after 1999 so it is not true to state that the Petitioner did not legally exist.
47. On the question whether the Petitioner can sue or be sued in its own name, the Respondents submit that unincorporated bodies such as the Petitioner can sue by members of the group or through its nominated officials. This is a matter which in my view does not go into the root of the Petition as it could have been cured by amendment if raised earlier for the determination before the Petition was set for hearing in the case of D. T Dobie vs Muchina (1982) KLR it was held that;

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in Dt Dobie & Company (Kenya) Ltd. V. Muchina (1982) KLR I in which Madam J. A. at page 9 said:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with merits “without discovery, without oral



evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

48. Further, in the affidavit sworn in support of the Petition, Isaack Abdi Adan stated that he was the Chairman of the Petitioner and in paragraph 3 he deposed thus;

“I have obtained the authority of the officials of the Petitioner to swear affidavits and plead on their behalf. Attached hereto and marked 1AA – 2 is a copy of the said authority.”

49. The failure to include the title of the Chairman on the head of the Petition was not fatal as the affidavit confirmed the Petitioner was represented through its nominated officials. On the case law cited of Kipsiwo Community Self Help Group Vs. Attorney General and 6 Others (2023) eKLR where Munyao J. in his holding stated inter alia “that the members of the group have to bring an action in their own names of a few can bring an action on their behalf in the nature of a re-representative action... Such bodies have to use the agency of a person recognized in law as having capacity to sue or be sued.

50. This case is persuasive and in my view, I take a different stand that a self-help group can bring a suit through its officials or persons nominated. In this case, Isaack Adan (its Chairman) was nominated to swear documents on behalf of the membership of the Petitioner. Paragraph 8 of the Petition stated that the Petitioners’ members are the legal owners of the suit property. The Petition thus clarified that it is its members who own the suit land and was bringing this petition as a representative suit.

C) Whether the Petitioners have the legal right to the suit property?

51. The Petitioner stated that they hold a legal title to the suit property and have been in occupation. The Respondents stated that the suit property is public land contending that the Petitioner did not provide evidence to this court that the procedures for alienation of public land were followed.

52. Section 26 of the [Land Registration Act](#), 2012 provides;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

53. Courts are therefore mandated by Statute to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship that can only be challenged on grounds stipulated as above. In the present case the title produced by the Petitioner shows that the suit land is registered in her name. The Petitioner has provided evidence that the land was legally allocated to them by the Nairobi County Council currently sued as the 5th Respondent. They annexed several documents



in support of their averment inter alia, an agreement of lease executed on 10th February 2002 between the 5th Respondent and the Petitioner for a period of 99 years over plot no. R4- Kariobangi North Komarock Road. They enclosed payment receipts issued by the 5th Respondents towards processing of individual titles, for instance, receipt dated 29th October 1996 for Kshs 76300. There is also survey fee receipt dated 15th May 1996 issued by the 5th Respondent.

54. The Petitioner also produced minutes of the 5th Respondent's resolution under minute 19 of the General Purposes Committee meeting held on 13th September 2012 item no 283. Pursuant to these resolution, the 5th Respondent now issued individual allotment letters vide the allotment letters dated 23rd May 2016 (found at pages 104, 111, 117, 130, 134, 174 of the record of the Petition). Subsequently, the individual members of the Petitioner received a duly executed lease from the 5th Respondent (e.g at pages 138, 151, 170, 182 et al.) which lease was registered by the 7th Respondent on 15th February 2019 and 25th Sept 2019 and then issued the member with a certificate of lease on the same dates (page 142, 162, 178, 190 et al.).
55. Vide a letter dated 23rd April 2007, the 5th Respondent wrote to the DCIO Kasarani Division to investigate alleged forged letters and agreement of lease in possession of the Petitioner. The DCIO replied to this letter on 11th March 2008 stating that the officers of the 5th Respondent whose signatures were on the impugned agreement confirmed the signatures belonged to them. The DCIO added that the signatures were subjected to scrutiny by the Document Examiner at CID headquarters and there was no forgery. The 5th Respondent has not brought any suit against the Petitioner to challenge the Lease and the subsequent titles.
56. Despite the complaint raised in the year 2007 by the 5th Respondent, they still received payments from the Petitioner for survey, ground rents and stand premiums in respect the suit plot as exhibited in the survey fee receipts dated 31st July 2017 from various members of the Petitioner. The A.G pleaded that there are clear procedures for alienating public land and that the Petitioner did not produce evidence to show compliance with those procedures. The Petitioner produced the minutes of the 5th Respondent to allocate them the land, the actual allotment letters, duly signed leases and payments made thereof. The A.G did not elaborate which procedure was skipped and whether the Petitioner was the guilty party. I am satisfied that the Petitioner and its membership has satisfied this court that it followed due process in acquiring their titles.

c. Whether the Respondents were in violation of constitutional provisions set out in the Petition

57. The third issue is whether the Petitioner's membership proved that their properties were unlawfully destroyed by the Respondents in breach of their constitutional rights. The Petitioner pleaded that when they got wind of the intended demolitions and evictions, they moved to the court and obtained interim orders of injunction. In the court record is an order dated 3rd May 2020 which directed inter alia;

“until then, the 1st and 2nd Respondents are restrained from evicting the Applicants from L.R Nairobi Block/175 pending the hearing of the application inter parties”

58. From the pleadings, the impugned demolitions took place in the morning of 4th May 2020 at around 5am. Although the Petitioner and the Interested Party alluded to the demolitions taking place despite a court order stopping the same, they did not provide any evidence that the 1st and 2nd Respondents were served with the order of 3rd May 2020 before the demolition took place. The Petitioner's argument that their eviction was in violation of this court's order was thus not proved.



59. However, I shall look at the second limb of the argument that the evictions were carried out without service of any notice and was done in the most inhumane manner. The Petitioner stated they were never served with any notice. They also described in detail the inhumanness of the eviction exercise that was undertaken and the timing of the same. The Petitioner submitted that the Supreme Court's finding in the Mitubell case were crystallised into statute law under section 152 of the *Land Act* and must be complied with. The principles included the duty to give notice in writing and the duty to give affected persons the first priority to demolish and salvage their goods.
60. It is only the 8th Respondent who filed grounds of opposition. Okwengu JA in the case of Daniel Kibet Mutai and 9 Others vs Attorney General (2019)eKLR in discussing the issue of the Respondent's failure to file a replying affidavit stated thus;

This is a question that has previously been addressed by the High Court severally. Two examples will suffice.

- (32) In Phillip Tirop Kitur v Attorney General [2018] eKLR, Mativo J dealt with a similar situation in which the petitioner a former university student sued for violation of his fundamental rights and swore an affidavit in support of his petition, averring that he was arrested, subjected to torture, inhuman and degrading treatment, charged, convicted for sedition, and sentenced to a term of imprisonment without proper due process being followed. In response to the petition as in the present appeal, the Attorney -General only filed grounds of opposition, but did not file any replying affidavit or call any oral evidence. The High Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner's evidence stood unchallenged. The High Court awarded the petitioner Kshs 6,000,000. In addition, the High Court rejected the Attorney General's contention that the delay in filing the petition, had caused it prejudice, ruling that in the absence of a replying affidavit or oral evidence, the court had no facts upon which it could make such a finding.
- (33) Similarly, in the case of Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR Odera, J addressing a claim where the Attorney General as the respondent failed to file a replying affidavit stated:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates Vs Unesco Co. Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 Others Vs Hon. Attorney General Constitution Petition No. 8 of 2014* and *Eliud Nyauma Omwoyo & 2 Others –vs Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence



to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”

61. Relating the quoted decisions, it suffices to say in the case before me that the facts set out by the Petitioner and the Interested Party regarding the violations of the Respondents have not been controverted. In particular, the averment that the evictions were carried without any notice to the Petitioner and that their properties were demolished in the wee hours of the morning thus rendering them homeless. Consequently, I make a finding that there is proof made on the violations set out in the Petition.

d. Whether the Petitioner suffered losses

62. Under paragraph 12A & 12B of the Petition; paragraph K of the Petitioner’s replying affidavit sworn on 17th march 2023; and paragraphs 7 and 8 of the Interested Party’s replying affidavit all detailed the eviction that took place on the morning of 4th May 2020. The Petitioner also produced photographs showing properties that were demolished. As stated in paragraph 54 and 55 above, the facts regarding the damage to the Petitioner and their members’ properties have not been contested. Guided by the documents they have referred the court to, I find no basis to disbelieve their story.

e. Damages

63. In light of my findings that the Respondents actions of forcefully evicting the members of the Petitioner were in breach of the law and as result, they suffered both social and economic losses, they are entitled to be compensated. In determining whether the Petitioner is entitled to be compensated, I am guided by the Daniel Mutai vs A.G supra, where Okwengu J stated thus;

(43) As regards the weight or probative value of the factual evidence, that was averred in the affidavits, and whether the evidence is sufficient to prove the appellants’ claims, the appellants swore to what they personally suffered and experienced, and therefore their averments in the affidavits are direct evidence of what transpired. While it is true that the appellants did not have medical documents to substantiate their allegations that they were mistreated and suffered injuries, it must be appreciated that they had no opportunity to get such medical reports as most of them were incarcerated for a long time and only released long after the events that they were complaining about. Moreover, much of the torture and inhuman treatment that they alleged they suffered such as being stripped naked and kept in solitary confinement in water logged cells for days; being kept in a permanently overcrowded cell without proper ventilation and with a permanent pungent foul odour and with lights on day and night; and being subjected to incessant interrogation; being held incommunicado without access to treatment, visits or access to any person; were all psychological and mental torture that may not necessarily leave any telltale signs.

64. On the amount of damages payable, the Petitioner urged that the court does award general damages of Kshs 250000 to each of its 369 members. However, in the Petition, prayer 5 and 6 seek for liberty of the individual members of the Petitioner to bring a suit for the ascertainment of special, general and exemplary damages. The details of the individual losses were also not pleaded in this Petition so I hesitate to make any award in this Petition.

65. In conclusion, I enter judgement for the Petitioner against the Respondents jointly and severally in the following terms:

1. An order of restitution of the Petitioner’s members into the parcel of land known as Nairobi/Block/175 within 90 days of the date of this judgement.



2. A declaration be and is hereby made that the Respondents' actions of forceful eviction of the Petitioners was an abuse of power and unconstitutional and against statutory law.
3. A declaration be and is hereby made that the Respondents are in breach of rights enumerated in the Petition, as a result of which the petitioners have suffered damages, pain and suffering.
4. A declaration be and is hereby issued that the Petitioner are entitled to special damages, general and exemplary damages against the Respondents herein jointly and/or severally.
5. A declaration that based on prayer 4, the Petitioner's members are at liberty to file separate civil claims for the ascertainment of the individual special damages.
6. Costs

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2023

A. OMOLLO

JUDGE

