Wasike & 2 others v Attorney General & 2 others (Environment & Land Petition E001 of 2020) [2023] KEELC 19858 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19858 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT & LAND PETITION E001 OF 2020

DO OHUNGO, J

SEPTEMBER 20, 2023

BETWEEN

JOSAMU WANJALA WASIKE .... 1ST PETITIONER

ALEXANDER AMUKUNE .... 2ND PETITIONER

JACKSON OKUMU NAMUNYU (ON THEIR OWN BEHALF AND ON BEHALF OF M/S 1992 SQUATTERS SACCO) .... 3RD PETITIONER

AND

ATTORNEY GENERAL .... 1ST RESPONDENT

NATIONAL LAND COMMISSION (NLC) .... 2ND RESPONDENT

KENYA FOREST SERVICE .... 3RD RESPONDENT

JUDGMENT

1. The petitioners moved the court through petition dated November 3, 2020 and filed on November 4, 2020, in which they averred that they brought the petition on their own behalf as squatters in Turbo Forest Reserve comprising Mautuma Central Settlement Scheme in Lugari Sub-County and on behalf of M/s 1992 Squatters Sacco, an entity registered with the Ministry of Labour, Social Security and Services. They further averred that the respondents had violated articles 19, 25, 26, 27, 28, 40, 43, 47, 48, 50 and 68 of the *Constitution* of Kenya. They therefore prayed for the following orders:

   a. An order of *mandamus* to compel the respondents to complete the Turbo Forest Reserve-Mautuma Central Settlement Scheme as planned at inception.

   b. An order of prohibition against the respondents restraining it from ever vetting or attempting to vet the petitioners.

c. A conservatory order securing the petitioners presence, occupation and utility of all that land known as Turbo Forest Reserve-Mautuma Central Settlement Scheme measuring 1577.86 hectares set apart for the resettlement of the landless squatters.

d. A declaration that the respondents procrastination in completing the resettlement programme by degazetting the land set apart for the petitioners is illegal and unlawful and has infringed, infracted and violated the petitioner inviolable right to a fair administrative action and fair hearing secured by articles 25, 27, 47, 48 and 50 of the *constitution*.

e. A declaration that the respondents have violated the petitioners right to legitimate expectations that they would get the land set apart for them in Turbo Forest Reserve and get titles which would confer ownership and the benefits that come with it.

f. An order of injunction be made against the respondents to compel them to compete (sic) the landless/squatter resettlement programme at Mautuma Central Scheme of Turbo Forest Reserve.

g. The honourable court do make such order or further orders as would be necessary to meet the ends of justice.

h. Costs of this petition and any other incidental proceedings be borne by the respondents for the inconvenience and uncertainty cause to the petitioners.

2. The petition is supported by an affidavit sworn by Josamu Wanjala Wasike, the first petitioner. He deposed that he is the chairman of M/s 1992 Squatters Sacco, a Self-Help Group that was formed to rally and organize the squatters around Turbo Forest in the Year 1992 who were beneficiaries of a resettlement programme that was ordered by the then President of the Republic of Kenya. That the resettlement programme targeted parts of Turbo/Lugari Forest and specifically Mautuma Central Settlement Scheme in Lugari District of the then Western Province and was designed and executed in two phases of 3000 acres and 6000 acres hived off Lugari Forest which formed part of Turbo Forest Reserve, a gazetted Forest Zone. He also deposed that after the presidential directive of 1992 that part of Lugari Forest be set apart for resettlement of landless people in Western Province, the Provincial Administration, the Ministry of Land and Settlement, the Kenya Forest Service and the Ministry of Environment and Natural Resources undertook survey, mapping, and zoning of the designated settlement area which led to settlement of about 10,000 squatters on 3000 acres of Forest Land in Phase 1. That the scheme was however not regularized by being planned, mapped and issuance of titles deeds because the forest land had not been degazetted from forest to a settlement area.

3. Mr Wasike went on to depose that the Ministry of Lands through the Settlement Department in Kakamega in conjunction with the Conservancy Committee of Western Province and the National Conservancy Board undertook approvals for the de-gazettement of the forest land by first approving the request by the settlement office on April 14, 2011 through its minute 7 of April 14, 2011 and thereafter by its letter of January 17, 2012. That the National Conservancy Board approved the request by the Western conservancy to degazette the Lugari Forest Zone for settlement of landless people of Western Province on 1577.86 hectares based on a recommendation of the report of the Ndungu Commission on Illegal and Irregular Allocation of Public Land through its minute No 18/2012. That 3800 acres that constituted phase 1 of the resettlement area was meant to benefit the landless of Western Province in the ratio of 5 acres per household, but that was not realised because the process was interfered with by the respondents who allowed strangers to be co-opted in the scheme, leading to some households getting 2 acres while others got 5 acres and more.

4. He further deposed that based on work done by the Western Conservancy, the National Conservancy Board and the Director of Kenya Forest Service, the National Environmental Management Authority (NEMA) adopted the Environmental Impact Assessment Report on the resettlement and consequently issued an Environmental Impact Assessment Licence. That the report was also tabled in the National Assembly by the sitting member of Parliament for Lugari, debated and adopted. That the petitioners herein and their members were beneficiaries of phase 2 of the proposed settlement scheme which targeted 6000 acres of the forest land and that both phase 1 and 2 of the proposed settlement are threatened with interference from local leaders and bureaucracy by Government functionaries who are now calling for fresh vetting of beneficiaries which will adversely affect the petitioners as some may be removed and replaced by impostors as happened in the 1993 settlement.

5. He also deposed that since the resettlement programme began in 1992, the respondents have not fully committed to its realization as the de-gazettement of the earmarked forest area has not happened and the petitioners are uncertain as to their ownerships of the parcels they were promised. That the second respondent visited the area and listened to the petitioners and other residents but to date its recommendations have not been made public, which too has left the petitioners without information thereby rendering this petition necessary. He further deposed that the petitioners as beneficiaries of the proposed resettlement scheme had a legitimate expectation that the respondents would act in such a manner as to lead to issuance of titles to each household of the target community thereby reducing poverty in the affected area.

6. The second respondent opposed the petition through grounds of opposition in which it stated that section 134 (1) of the *Land Act* 2012 is specific in granting the National Government the mandate to implement settlement programmes to provide access to land for shelter and livelihood; that section 134 (3) further enables the National Government to administer settlement programmes but in consultation with the commission and respective county governments; that from the said sections, the position of the *Constitution* is that the second respondent can only go as far as identifying and ascertaining the availability of land for settlement while the actual settling of persons is the sole responsibility of the National Government through the Ministry of Land and Physical Planning; that the prayers sought against the second respondent can only be enforced to the extent that the second respondent should identify land for purposes of settlement; and lastly, that the petitioners have not raised a justifiable cause of action against the second respondent and the orders sought cannot be enforced by or against the second respondent.

7. The first and third respondents opposed the petition through two replying affidavits: one sworn by Evans M.M Orumi, and another jointly sworn by Eliud Wafula Mulinga and Kennedy Barasa Kulecho.

8. Evans M.M Orumi described himself as the Officer in charge of records at the Settlement Office at Kakamega. He deposed that Mr Davies Magina who was the then records officer in charge of settlement of squatters under Mautuma Settlement Scheme handed over to him files relating to the scheme and that he had also acquainted himself with information concerning the scheme. That Mautuma Settlement Scheme was created for the purpose of resettlement of squatters who became landless after the white settler they were working for left for Europe. That part of Lugari Forest Zone was given out to the landless by a Presidential Decree in 1996 and that all squatters under the scheme have been settled. He annexed a list which he stated was signed by the then Deputy County Commissioner and Secretariat official and added that the list submitted by the petitioners is a foreign one. That 1992 Squatter Self Help Group is an unknown body which is unconnected to Mautuma Settlement Scheme. He added that the Government only settles genuine squatters and that all genuine squatters have been settled and issued with allotment letters. That parliament is yet to grant approval for de-gazettement and that the parliamentary report dated February 17, 2017 was a recommendation and not an approval.

9. In their replying affidavit, Eliud Wafula Mulinga and Kennedy Barasa Kulecho described themselves respectively as Chairman and Secretary of Mautuma Central Scheme (Impact Assessment Committee). They deposed that by Presidential Decree way back in 1996, part of Lugari Forest Zone was given out to the landless who had become squatters after the white settler who was their employer left for Europe. That all the squatters in Lugari Forest Zone under Mautuma Settlement Scheme have been settled. That the list of Squatters under the name 1992 Squatter Self Help Group is a foreign list which has no relation at all with the squatters already settled in part of Lugari Forest Zone pursuant to the Presidential Decree of 1996. That 1992 Squatter Self Help Group is a foreign body unknown to them as opposed to Mautuma Settlement Scheme whose members they had documented and whose names they confirmed were captured in the settlement list under Mautuma Settlement Scheme who they interact with on the ground.

10. Eliud Wafula Mulinga and Kennedy Barasa Kulecho further deposed that while serving in their capacity of elected Chairman and Secretary, respectively, of Mautuma Central Scheme, they attended a meeting on July 14, 2021 at County Hall in Kakamega County upon the invitation of County Executive Committee Member (CECM) for Lands, Housing, Urban Areas and Physical Planning in respect of the disputed issue of settlement of squatters at Lugari Forest Zone, which meeting was also attended by Alexander Amukune who is one of the petitioners herein and it was found that Alexander Amukune did not have any documents in support of the alleged settlement of squatters at Lugari Forest Zone. That during the meeting, the Director of Survey confirmed that he had settled all genuine squatters on 1577.80 hectares at Lugari Forest Zone and that the meeting resolved that all the attendees were to help the squatters who had allotted (sic) numbers to get title deeds. That following the meeting, the Sub-County Land Adjudication and Settlement Officer (Lugari Sub-County) wrote to the Director of Land Adjudication and Settlement a letter dated November 12, 2021 concerning squatters who were already settled under Mautuma Settlement Scheme but occupied swampy and rocky areas which were considered ecologically sensitive areas. They therefore urged the court to dismiss the petition.

11. The petition was canvassed through written submissions. The petitioners filed submissions on December 9, 2022. A perusal of the said submissions shows that they are in respect of notice of motion dated December 9, 2022, an application that was struck out for being an abuse of the court's process. Owing to previous delays occasioned by the petitioners, the court ordered on November 21, 2022 that the petitioners file and serve their submissions within fourteen days and in default the petition would stand dismissed. Despite being fully aware that they had been given a last opportunity to file submissions, the petitioners opted not to address the petition in their submissions.

12. The first and third respondents argued that the petitioners have no *locus standi* to file the petition on behalf of Mautuma Settlement Scheme in respect of which all genuine squatters were settled. They also argued that the petitioners are not genuine squatters and therefore have no right to allocation of land at Mautuma Central Settlement Scheme. That 1992 Society Sacco together with the petitioners are not related to or acting in the interest of Mautuma Central Settlement Scheme. They therefore urged the court to dismiss the petition with costs.

13. The second respondent did not file any submissions.

14. I have considered the petition, the affidavits, grounds of opposition and the submissions. The issues that arise for determination are whether the petitioners are squatters within Turbo/Lugari Forest and Mautuma Central Settlement scheme and whether the reliefs sought should issue.

15. At the core of the petitioners' case is their claim that they and members of 1992 Squatters Sacco are beneficiaries of 6000 acres of forest land within Turbo/Lugari Forest and Mautuma Central

Settlement scheme, which they refer to as "phase 2 of the proposed settlement". They are concerned that fresh vetting of squatters or beneficiaries will result in interference from local leaders and bureaucracy by Government officers which will adversely affect them since some of them may be removed and replaced with others who they consider impostors. On the other hand, the first and third respondents contend that the petitioners are not genuine squatters and therefore have no right to allocation of land at Mautuma Central Settlement Scheme. Thus, to resolve the rival contentions, it would be inevitable to determine if the petitioners are indeed squatters as they claim.

16. It must however be remembered that the petitioners chose to move the court through a constitutional petition. The determination of whether the petitioners are genuine squatters and therefore entitled to allocation of land at Mautuma Central Settlement Scheme is purely a question of evidence to be determined in an ordinary civil claim and does not require the attention of the constitutional jurisdiction of this court. See *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR and *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR. The petitioners are before the wrong court in so far as they are intent on proving that they are squatters within Turbo/Lugari Forest and Mautuma Central Settlement scheme.

17. The reliefs that the petitioners seek flow from whether they are genuine squatters who are entitled to allocation of land at Mautuma Central Settlement Scheme, yet prominent among the reliefs sought is an order prohibiting the respondents from ever vetting or attempting to vet the petitioners. One then wonders how they ever intend to achieve a just determination of the dispute without being ready to be vetted.

18. I also note that the petitioners contend that to realize their dream, there will have to be de-gazettement of 1577.86 hectares of the Lugari Forest Zone for purposes of human settlement. That is no small matter. Dwindling forest cover is a concern for everyone since it has severe effects on climate and biodiversity, among others. Any de-gazettement would have to maintain fidelity to the relevant statutory provisions, be based on sound science and be guided by the principles of sustainable development including the precautionary principle. This court cannot therefore compel the respondents to de-gazette a portion of the Lugari Forest, as is sought.

19. In view of the foregoing, I find no merit in the petitioners' case, and the reliefs sought cannot therefore issue. Consequently, I dismiss the petitioners' case with no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE