



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 24 OF 2019

IN THE MATTER OF ARTICLES 10, 28, 40, 43 (1) B, 47, 48, 60 AND 67 OF THE CONSTITUTION

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND DENIAL OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

IN THE MATTER OF THE RESETTLEMENT OF THE NTIRIMITI SUBUIGA SQUATTERS

BETWEEN

MUGAMBI M'IMUNYA (Suing on his own behalf and on behalf of

NTIRIMITI SUBUIGA SQUATTERS TRUST)PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The petitioner brings this petition on his behalf and on behalf of Ntirimiti Subuiga Squatters Trust claiming that in 1991, the Government initially allocated then **L.R No. 2822/3 Ntirimiti settlement scheme** whereon their members took vacant possession and lived until 1994 and 1998 when the government through the Meru District Commissioner without notice or justifiable reasons evicted them from the land and have since been living in temporary houses by the roadside bordering the parcel No. 2806/3.

2. In 2015, the petitioners aver they petitioned the National Assembly through notice dated 8.9.2015 with a view of resettling their families then approximated at 215 in number. This led to the Departmental Committee on lands of the National Assembly making recommendations that since **L.R No. 2806/3** was a gazetted wildlife corridor, the 1st defendant/respondent should look into the status of **L.R No. 9762/2** with a view of resettling the petitioners. This was vide a status report forwarded through a letter dated 13.5.2019.

3. The petitioners plead they have a constitutional right to property and access to adequate housing, including reasonable standards of sanitation, now ignored by the 1st and 2nd respondents.

4. The petitioners aver the 1st respondent has failed to conduct its duties as contained in **Article 67 (2) (e) of the Constitution** as read together with **Section 5 of the National Land Commission Act No. 5 of 2012** with regard to initiating investigations over the historical land injustices faced by them and by making the appropriate recommendation on redress.

5. It is averred that the 2nd respondent has failed its Constitutional and statutory mandate:- by recommending **L.R No. 9762/2** which could not be excised for the resettlement of the petitioners since it was a private land; that the 2nd respondent failed to award the petitioners on alternative land making them continue suffering by living in deplorable and inhuman conditions making them destitute with no place to call home.

6. The petitioners pray the court declares the respondents to have violated their Constitutional rights under **Articles 40, 47 and 48 of the Constitution**; an order compelling the respondents to provide an alternative land to solve their resettlement; declaration that the government

has abdicated its role and has become an escapist by acting on individual presidential whims, sweet and caprice and an award of damages for pain, suffering, humiliation and distress that has been visited upon them.

7. The petition is supported by an affidavit sworn by Mugambi M'Imunya on 3.10.2019 attaching copies of a list of committee and members' petition to parliament in 2013; brief report by the parliamentary department committee; recommendations by the departmental committee to the 1st respondent; letter dated 10.10.2018 to the County land management board; reminder to the parliamentary departmental committee and the status report annexures marked **MM1 – MM7** respectively.

8. The respondents were served with the petition and an affidavit of service filed on 7.1.2020.

9. The 2nd respondent has opposed the petition through grounds of opposition dated 3.2.2020 in that:-

a) The 2nd respondent is wrongly enjoined in the petition.

b) The petitioners have not demonstrated the violation or threatened violation of their fundamental right and freedoms and the manner in which the 2nd respondent has violated or threatened their rights.

c) The petition does not disclose any reasonable cause of action against the 2nd respondent.

d) The petition is misconceived, mischievous and an abuse of the court process.

10. With leave of court, parties opted to dispose the petition by way of written submission dated 18.11.2021 and 3.12.2021 respectively.

11. The petitioners submit the 1st respondent though served with the petition did not enter appearance or file any response.

12. In their view, four issues call for determination namely violation of their constitutional rights, an order compelling the respondents to offer them alternative land for resettlement, if they are entitled to damages and who is entitled to costs.

13. On the 1st issue, the petitioners submit there is no doubt that they have been subjected to violation of their rights and freedoms and that none of the respondents have denied those facts.

14. They rely on the role of the Attorney General as per **Executive Order No. 2 of 2013 and Articles 156 and 260 of the Constitution** with regard to the roles and duties of the respondents as per their earlier submissions dated 5.2.2021.

15. The petitioners submit under **Article 63** and going by **Reference No. 2 of 2014**, the 1st respondent shares institutions with both the National and County Governments and despite the National Assembly resolution, the respondents have not implemented the resolutions hence making them suffer.

16. The petitioners urge the court to find the omissions and commissions of the respondents falling short of their constitutional rights to own property and fair administrative action.

17. Further, the petitioners submitted that the mandate of the 1st respondent as set out under **Article 67 (2) of the Constitution** as read together with **Section 5 of the National Land Commission Act**, the respondents have largely contributed to the violation of **Article 43 (1) and 40 of the Constitution** by failing to execute the directive by the National Assembly.

18. The court has gone through the pleadings and written submissions. The issues commending themselves for determination are:-

1) If the petition meets the threshold of a constitutional petition.

2) If the respondents have violated the petitioners' constitutional rights and freedoms as alleged.

3) If the petitioners are entitled to any reliefs and if so, what reliefs.

4) What are the orders as to costs.

19. What constitutes a constitutional petition has been determined by the court starting with the case of **Anarita Karimi Njeru –vs- Republic [1979] eKLR** and **Trusted Society of Human Rights Alliance –vs- Mumo Matemu & 5 Others [2014] eKLR**.

20. In **Anarita Karimi Njeru** case, the court held there should be reasonable precision in framing issues in a constitutional petition.

21. In **Mumo Matemu** case, the court held a petition must provide the particulars as to the allegations and the manner of the alleged infringements.

22. On the issue of evidence, the court held the fundamental hallmark of the rule of law is evidence whether real, documentary, circumstantial or presumptive as the basis of any judicial decision.

23. In Washington Jakoya Midiwo –vs- Minister of Internal Security & 2 Others [2013] eKLR, it was held the court could not find its decision on the basis of parliamentary debates or views whose quality it could not assess and or evaluate.
24. The power to determine a constitutional petition is donated to the court under **Articles 165 3 (b) and (d) of the Constitution**. The petitioners have invoked **Articles 10, 28, 40, 43 (1) b, 47, 48, 60 and 67 of the Constitution**.
25. The petitioners' case is that in 1994 – 1998, they were without justifiable reasons evicted from **L.R No. 2806/3 Subuiga Bosnia** and have since been living in temporary houses by the roadside along the boundary of **L.R No. 2806/3**. In efforts to resolve their issue, the petitioner avers they got a positive response from the National Assembly departmental committee on lands recommending to the respondents to provide an alternative land for them was forwarded.
26. The petitioners aver the respondents have failed in their duties and Constitutional mandate in effecting the parliamentary recommendations and or using their constitutional mandate to recommend an appropriate redress.
27. As a result of the inaction by the respondents, the petitioners aver their rights as to ownership of property, fair administrative actions act, access to justice and right to accessible and adequate housing and reasonable standards of sanitation have been infringed and or threatened hence subjecting them to loss and damage.
28. Even though the petitioners have not particularized with specificity the **articles of the Constitution** and the injuries, loss and damage suffered, I am of the considered view the petition to a large extent has reached the minimum threshold of a constitutional petition as set out in both Mumo Matemu and Anarita Karimi Njeru cases (**Supra**).
29. Moving to the next issue as whether the rights and freedoms of the petitioners as regard **Articles 40 (3), 43 (1) (b), 67 (2) (e) 47 and 48 of the Constitution** have been violated, threatened or infringed by the respondents.
30. The petitioners describe themselves as a Trust. It is not explained where it is registered and wherein it draws its membership. At paragraph 4 of the petition, it is averred they had initially been allocated by undisclosed body **L.R No. 2806/3 and 2822/3 Ntirimi Settlement Scheme in 1991** where they settled and lived. It is not very clear under what terms the petitioners had been allocated the land since the said land was not available for reallocation in the first instance being a gazetted wildlife corridor.
31. The petitioners have also not pleaded where they owned land and or were living prior to 1991. At paragraphs 6, 7, 8, 9, 10 and 11 of the petition, the petitioners have not sued any of the organs which made the recommendations and have not stated the legal and constitutional effect of those recommendations.
32. In particular, other than the recommendations by the parliamentary committee, the petitioners have not pleaded any express submissions of a complaint or request to the 1st respondent in line with **Article 67 (3) of the Constitution** as read together with **Section 15 of the National Land Commission Act** which required such a complaint be lodged within 5 years as provided under **Section 15 (3) (e)** for investigations so as to make a claim that the respondents have abdicated their constitutional and Statutory role to investigate, and take appropriate redress including resettlement on an alternative land.
33. Further, the petitioners have not pleaded and or produced any evidence that they formally lodged a complaint for registration, hearing and determination in line with **Rules 5, 6 7, 14, 16, 17, 24, 27, 28, 29 and 30 of the National Land Commission (Review of Grants and Disposition of Public Land) Regulations Rules 2017** as well as **Rules 4, 7, 12, 13, 18, 19, 23, 26, 27 and 29 of the National Land Commission (Investigations of Historical Injustices Regulations 2017)**.
34. The framers of the Constitution did not leave anything to chance. As at 2012, there was already an alternative dispute resolution mechanism set out under the National Land commission in line with **Articles 62 (1) (c) and (g) and (2) as read together with 67 (2) (e) and (f) of the Constitution**.
35. The petitioners had a duty and an obligation to subject themselves to that process. Instead they have decided to move to court directly. In the petition, the petitioners aver the initial land was gazette wildlife corridor while the proposed other parcel of land was privately owned. The petitioners have not demonstrated where else their own land lies. The court cannot enforce their rights as to **Article 40 of the Constitution** without any nexus to any land owned by the 1st and 2nd respondents and or available for their resettlement.
36. In Monica Wangu Wamwere –vs- Attorney General [2019] eKLR, it was held anyone presenting a Constitutional petition must back it up with cogent evidence.
37. The petitioners had a duty and an obligation to demonstrate how the respondents have denied them the right to access to justice, fair administrative action and the right access to adequate housing and reasonable standards of sanitation.
38. The petitioners have presented no evidence of any specific request for action under **Article 260 of the Constitution, Sections 4, 5 and 6 of the Fair Administrative Actions Act 2015** prior to the lodging of this petition directed at the respondents herein and in which they have failed to act so as to request the court to grant prayers in line with **Articles 21, 22, 23 and 24 of the Constitution** as read together with **Section 11 of the Fair Administrative Actions Act 2015**.
39. The petitioners cannot come and allege constitutional breach of their rights and freedoms by the 1st respondent without invoking its jurisdiction and following up under the statutory internal dispute mechanisms.
40. In Henry Wambega & 733 others –vs- Attorney General & 9 others [2020] eKLR, **Munyao Sila J** held the court would not be the best

forum where investigative process is going to be needed especially where facts are not clear.

41. In the instant case, this court cannot tell with precision and or finality in which parcel(s) of land the petitioners are entitled to their rights and ownership and or how the respondents have failed to resettle them. There must be an historical connection or claim to a certain land.

42. As regards the suffering or living under deplorable conditions and poor sanitation standard, no photographs have been exhibited to that effect and no assessment reports have been supplied to this court to show exactly the area they occupy, the state of sanitation and housing in the area and whether any public health officer has complained over the state of the petitioners in line with the **Public Health Act**. See *Evans Muswahili Ladtema –vs- Vihiga County Public Service Board & 2 Others [2021] eKLR, Satrose Ayuma & 11 Others –vs- Registered Benefits Scheme & 3 Others [2010] eKLR quoting Grootboom Case South Africa.*

43. In the premises, I find the petition lacking merits. The same is dismissed with no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA OPEN COURT AT MERU THIS 9TH DAY OF FEBRUARY, 2022

IN PRESENCE OF:

MRS. OTIENO FOR PETITIONER

MR. KIETI FOR 2ND RESPONDENT

NO APPEARANCE FOR 1ST RESPONDENT

COURT ASSISTANT – KANANU

HON. C.K. NZILI

ELC JUDGE